83 - 1749

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HEINRICH SCHMIDT REEDEREI,
Petitioner,

v.

WILLIE MAE BYRD, As Administratrix of the
Estate of Lawrence Byrd, deceased,
Respondents.

PETITION OF HEINRICH SCHMIDT REEDEREI FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals erred by ruling that, as a matter of law, the below market discount rate is the only method to be used in the (old) Fifth Circuit to adjust damage awards to account for the effects of inflation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit (former Fifth) entered in this proceeding on September 22, 1982.

OPINION BELOW

The opinion below consists of the following decisions (listed chronologically):

1. Judgment entered by the U.S. District Court for the Middle District of Florida, Tampa Division.

2. Opinion of the U.S. Court of Appeals for the Fifth Circuit. *Byrd* v. *Reederei,* 638 F.2d 1300 (5th Cir. 1981).

3. Petition for Rehearing and Petition for Rehearing En Banc. *Byrd* v. *Reederei,* 650 F.2d 1324 (5th Cir. 1981).

4. En Banc Opinion of the U.S. Court of Appeals for the Fifth Circuit. *Byrd* v. *Reederei*, 688 F.2d 324 (5th Cir. 1982).

5. En Banc Opinion of the U.S. Court of Appeals for the Fifth Circuit. *Culver* v. *Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982). *Byrd* v. *Reederei* case number 78-3064, was consolidated with *Culver* v. *Slater Boat Co.*, number 79-3985.

6. En Banc Opinion of the U.S. Court of Appeals for the Fifth Circuit. *Culver* v. *Slater Boat Co.*, and *Byrd* v. *Reederei*, 722 F.2d 114 (5th Cir. 1983).

The decisions appear in the Appendix to this writ.

JURISDICTION

The Judgment of this Court of Appeals for the (old) Fifth Circuit sought to be reviewed in this case was entered on December 22, 1983. A timely Petition for Rehearing en banc was denied on February 24, 1984, and this Petition for Certiorari will be filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The facts are not in dispute. On July 28, 1975, the German freighter M/V ANTARES arrived at Port Manatee, Florida, there to be fully loaded with densely compacted cardboard cartons. Petitioner Heinrich Schmidt Reederei, (hereafter, for convenience, Schmidt), the vessel's owner, retained a stevedoring company to carry out the loading operations. During the course of those operations, several bales of cardboard fell on a group of longshoremen who had been hired by the stevedoring company, injuring two of them and killing a third. The injured longshoremen and the widow of the deceased filed suit pursuant to Title 33 U.S.C. § 905(b).

In the trial below, all three actions were consolidated for trial. All charged the Petitioner, Schmidt, with negligence. At trial, the District Court denied Respondents' motions for directed verdicts on the issue of contributory negligence, and

prohibited Respondents from introducing testimony on inflation. The jury was also instructed that it could not consider the effects of inflation in awarding damages. The jury returned verdicts for Respondents, but also found Respondents to be contributorily negligent and accordingly reduced the damages award. Motions for a new trial and for judgment notwithstanding the verdict were filed by the Respondents, and in due course were considered and denied, Respondent Byrd then appealed to the Court of Appeals for the Fifth Circuit which, on March 12, 1981, reversed the trial court and ordered the district court to enter judgment in the full amount of the damages assessed. However, the court of appeals also held that the trial court was correct in refusing to allow the jury to consider the effects of inflation in assessing damages.

On rehearing, the Court of Appeals for the Fifth Circuit held that, given certain guidelines, evidence of wage increases due to inflationary trends was admissible and remanded the case for new trial. Subsequently, on the December 22, 1983, on re-hearing, the Fifth Circuit modified its earlier holding, mandating the use of the below-market discount rate method alone in considering the effects of inflation.

REASON FOR GRANTING THE WRIT

The Fifth Circuit Court Of Appeals Disregarded The Mandate Of The Supreme Court As Set Forth In *Jones & Laughlin Steel Corp. v. Pfeifer,* ___ U.S. ___, 103 S.Ct. 2541, 76 L.Ed. 768 (1983).

In adopting a single method of calculating damages, the below-market discount rate, the Fifth Circuit has disregarded the Supreme Court's warning in *Jones & Laughlin Steel Corp. v. Pfeifer,* ___ U.S. ___, 103 S.Ct. 2541, 76 L.Ed. 768 (1983), that economic evidence is distinctly inconclusive regarding an essential premise upon which this method is based. The Supreme Court recognized that due to changing circumstances, none of the three methods, set forth as legally acceptable, would be valid for all cases. The adoption by the Fifth Circuit of

only one of the three methods acceptable to the Supreme Court forecloses the use in trial courts of the other methods acceptable to the Supreme Court and precludes the admission of evidence necessary to lay a predicate for the other methods, which might lead to more realistic awards, which was the purpose behind the ruling in *Pfeifer*. For these reasons Petitioner submits that this decision conflicts with the decision of the Supreme Court in *Pfeifer*.

CONCLUSION

For the above reason a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

United States District Court

FOR THE MIDDLE DISTRICT OF FLORIDA—TAMPA DIV

Civil Action File No. 75-696-Civ-T-H

WILLIE MAE BYRD, individually, and as Administratrix of the Estate of Lawrence Byrd, deceased, and MIDLAND INSURANCE COMPANY, a corporation

v.

HEINRICH SCHMIDT REEDEREI, a foreign corporation,

JUDGMENT

FILED
TAMPA, FLA.
APR 20 1978
WESLEY R. THIES
CLERK

This action came on for trial before the Court and a jury, Honorable Wm. Terrell Hodges, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiffs WILLIE MAE BYRD, individually, and MIDLAND INSURANCE COMPANY, a corporation, recover of the defendant HEINRICH SCHMIDT REEDEREI, a foreign corporation, the sum of $50,000.00, with interest thereon at the rate of 6% as provided by law, and their costs of action; and that the plaintiffs WILLIE MAE BYRD, as Administratrix of the Estate of Lawrence Byrd, deceased, and MIDLAND INSURANCE COMPANY, a corporation, recover of the defendant HEINRICH SCHMIDT REEDEREI, a foreign corpora-

tion, the sum of $12,500.00, with interest thereon at the rate of 6% as provided by law, and their costs of action.

Dated at Tampa, Florida, this 20th day of April, 1978.

Wesley R. Thies
WESLEY R. THIES
Clerk of the Court

By John F. Gay
JOHN F. GAY
Deputy Clerk

APPENDIX B

United States Court of Appeals
Fifth Circuit, Unit B

March 12, 1981

No. 78-3064

Willie Mae BYRD, as Administratrix of
the Estate of Lawrence Byrd, deceased,
Plaintiff-Appellant-Cross-Appellee,

v.

Heinrich Schmidt REEDEREI,
Defendant-Appellee-Cross Appellant.

Widow brought action under Longshoremen's and Harbor Workers' Compensation Act against shipowner. The United States District Court for the Middle District of Florida, Terrell Hodges, J., entered judgment on jury verdict, and appeal was taken. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) holding longshoremen contributorily negligent for failing to stop work after shipowner had been notified of dangerous condition and failed to remedy such condition impermissibly charged longshoremen with assumption of risk, and (2) District Court did not err in instructing jury not to consider effects of inflation in assessing damages.

Affirmed in part and reversed in part, and judgment vacated and case remanded for entry of new judgment.

Joel D. Eaton, Walter H. Beckham, Jr., Miami, Fla., Roger Vaughan, Wagner, Cunningham, Vaughan & Genders, Tampa, Fla., for plaintiff-appellant, cross-appellee.

Fowler, White, Gillen, Boggs, Villareal & Banker, Nathaniel G. W. Pieper, Dewery R. Villareal Jr., Tampa, Fla., for defendant-appellee, cross-appellant.

Appeals from the United States District Court for the Middle District of Florida.

Before KRAVITCH and FRANK M. JOHNSON, JR., Circuit Judges and ALLGOOD, District Judge.

KRAVITCH, Circuit Judge:

This action under the Longshoremen's and Harbor Workers' Compensation Act arises from the death of Lawrence Byrd, a longshoreman killed while loading freight aboard a ship owned by appellee, Heinrich Schmidt Reederei. The jury found Reederei negligent and assessed total damages of appellant Willie Mae Byrd, Byrd's widow and the administratrix of his estate, at $125,000. The jury also found Byrd 50% at fault. The court rendered judgment for appellant Byrd in the amount of $62,500, half the damages assessed. Two issues confront us: 1) whether, as a matter of law under the Act [LHWCA] as amended in 1972, a longshoreman may be found contributorily negligent for failing to stop work after a shipowner has been notified of a dangerous condition and fails to remedy it, and 2) whether a jury instruction not to consider inflation in calculating damages was erroneous. We conclude that the court improperly applied contributory negligence but did not err in its jury instruction regarding inflation; *Johnson* v. *Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (en banc), prohibiting instructions, *contra*, remains the law of this circuit. We affirm in part, reverse in part and remand with directions that the district court enter judgment for appellant in the full amount, $125,000, found by the jury.

I.

The facts are not in dispute. Shortly after midnight on July 28, 1975, the German ship M/V ANTARES arrived at Port Manatee, Florida to be fully loaded with densely compacted old cardboard cartons (hereafter, "OCC"). Reederei, the vessel's owner, had retained as stevedore Eller & Co. to carry out the loading operations. Lawrence Byrd was one of several independent longshoremen Eller & Co. hired at the local union hall on the morning of July 28 to load the ship.

The stevedoring hierarchy, insofar as it is relevant, was as follows: Eller's "ship superintendent: Michael O'Kash was in charge. Below him were two "ship foremen," Willie Doby and Hugh Overton. Under the ship foreman were four "headers," each of whom was responsible for overseeing the loading of one of the ship's four holds, and the longshoring "gang" assigned to that hold. Rudy Logan was the "header" in charge of the number 3 hold; his gang consisted of nine men: two "landers" on the pier, who tied the bales of OCC to the crane-like cargo boom; a "winchman" operating the cargo boom on board the deck; a "flagman" directing the winchman; a forklift operator in the hold who placed the lowered bales into a stowed position; three "pullers" in the hold who detached the bales from the cargo boom's hook after they were lowered; and an additional longshoreman who rotated between the winch and forklift, freeing one man from work.

The bales of OCC, each measuring five feet by five feet by three and a half feet, tied with wire, and weighing approximately 1500 pounds, were thus lifted from the pier and lowered through the narrow opening in the top of each hold by the cargo boom, detached from the boom by the "pullers," and moved to the sides of the hold and stowed in stacks six high by the forklift operator. Eller & Co. selected this method of stowage.

On July 28, Byrd, who had 22 years' experience as a longshoreman and was qualified to be a header, was hired as a puller and assigned to the number 3 hold. With him as pullers were Lucious Holden and William Avant. Holden had five years' experience as a longshoreman and Avant slightly less than that. With respect to complaints regarding working conditions, the stevedoring hierarchy was strictly enforced: "pullers" were to complain only to "headers" who in turn could speak only to the ship foremen who, with O'Kash, could complain directly to the vessel's crew. Anyone, however, could complain to the crew of very serious conditions.

The lines tying the ship to the pier descend from the ship to the pier. As the ship is loaded, riding lower in the water, they slacken, allowing the ship to roll and creating the possibility

that stacked freight can fall. (With slack lines, the ship rolls inshore each time a cargo boom lifts cargo from the pier.) The lines must therefore be continually tightened during loading. The parties agree that tight lines and a stable ship are essential to safe loading and that on board the ANTARES these conditions were solely the responsibility of the ship's crew and not of the stevedore or of individual longshoremen, who were forbidden to touch the lines. The parties further agree that on July 28 the lines slackened throughout the day, the ship rolled considerbly, and stevedore employees repeatedly complained of this condition to the ship's crews. Reederei also admits that although the ship's rolling and the complaints continued into the afternoon, the crew tightened the lines only once, at approximately 10:15 a.m.

At 3:50 p.m., Byrd, Holden and Avant were in the number three hold with the forklift operator awaiting delivery of additional bales. The men stood on the offshore side of the hold in front of a number of bales which had already been stowed, since this was their safest location when the cargo boom brought the cargo in over the inshore side of the hatch. Without warning, several bales fell from the stacks in the offshore wing toward the center of the hold, striking the forklift and the three men. Two bales fell on Byrd, crushing his chest. He died approximately 25 minutes later. Holden and Avant were injured.

In her complaint, appellant alleged that the shipowner's negligence was a proximate cause of her husband's death. Holden and Avant brought like suits; the three were consolidated for trial. Reederei denied liability and alleged alternatively that the three men, having continued to work under conditions they knew to be dangerous, were contributorily negligent. The court denied plaintiffs' motion for a directed verdict on the contributory negligence issue, stating that the evidence of plaintiffs' negligence "may be slight or nil" but that continuing to work under dangerous conditions after protesting to no avail "could arguably constitute negligence." Hence, it submitted the question to the jury. Over plaintiffs' objection, the court also charged the jury that they were not to

increase any damages awarded to plaintiffs because of an expectation of future inflation. The jury found Reederei negligent, and Lawrence Byrd, Holden and Avant 50%, 20% and 10% at fault, respectively. It assessed appellant's damages at $125,000, and the court entered judgment for her in the amount of $62,500. Willie Mae Byrd's motions for a new trial and for judgment notwithstanding the verdict were denied.

On appeal Byrd raises three issues: 1) that the trial court erroneously denied her motions for a directed verdict and for judgment notwithstanding the verdict on the issue of contributory negligence, instead submitting it to the jury, 2) alternatively, that the trial court erroneously denied her motion for new trial on the ground that the jury's assignment of three different percentages of fault to Byrd, Holden and Avant and its finding that Byrd was equally at fault with the shipowner for failing to stop work were irrational and against the manifest weight of the evidence, and 3) that the court erred in refusing to allow the jury to consider the effects of inflation in awarding damages.

II.

Boeing Co. v. *Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc) governs our review of motions for directed verdict. Unless there was "a conflict in substantial evidence," 411 F.2d at 375, the court improperly submitted the question to the jury. Appellant Byrd argues that there was no evidence favoring appellee on this issue, because holding a longshoreman contributorily negligent for failing to stop work after he has complained to no avail of dangerous working conditions is tantamount to holding that he assumed the risk, a now impermissible defense. Reederei counters that contributory negligence properly applies in this situation, especially under the 1972 amendments to the LHWCA. In this guise the issue is drawn; Reederei does not argue that Byrd (or his co-workers Holden and Avant) was negligent in any respect other than failing to stop work.

[1] We first note that there is no question that assumption of the risk is not a permissible defense to actions brought under the LHWCA, as was made clear in *Gay* v. *Ocean Transport & Trading, Ltd.*, 546 F.2d 1233, 1238 (5th Cir. 1977):

> [C]ertain common land-based principles of state law are not to be carried over into the federal law governing LHWCA suits. Assumption of risk may not be utilized as a defense. . . .

Thus, our primary question is whether, as appellant claims, the trial court impermissibly applied the assumption of risk defense, albeit by another name — contributory negligence — or whether, as appellee contends, this is merely a factual inquiry to which contributory negligence properly applies.

In *Schlemmer* v. *Buffalo, Rochester & Pittsburgh Railway Co.*, 205 U.S. 1, 27 S.Ct. 407, 51 L.Ed. 681 (1907), the Supreme Court faced a similar question. A railroad employee was killed while performing his job and the statute under which his administrator sued abrogated an assumption of the risk defense. Judgment was entered for the railroad on the ground that the decedent had been contributorily negligent. Justice Holmes thus addressed the same distinction we now consider:

> [T]he risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law. Probably the modification of this general principle by some judicial decisions and by statutes like § 8 [abrogating the defense] is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist.
>
> Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. . . . [T]he practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary con-

> duct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master . . ., then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name. . . . We cannot help thinking that this had happened in the present case. . . .

205 U.S. at 12-13, 27 S.Ct. at 409. Justice Holmes went on to state that the danger was so great and "inevitably an clearly attached to the risk which Schlemmer did not assume, that to enforce the statute [abrogating assumption or risk] requires that the judgment should be reversed." 205 U.S. at 14, 27 S.Ct. at 410.

Several circuits have applied the same logic to cases similar to the instant one brought under the LHWCA. Faced with parallel facts, in *Rivera* v. *Rederi A/B Nordstjernan*, 456 F.2d 970 (1st Cir.), *cert. denied*, 409 U.S. 876, 93 S.Ct. 124, 34 L.Ed.2d 128 (1972), the First Circuit held that appellant longshoremen could not be charged with contributory negligence for continuing to work, where they had complained of dangerous conditions and were told that the problem would be remedied and that they should return to work. "To say the plaintiffs were contributorily negligent in these circumstances would be to state that in continuing work they assumed the risk of obeying orders. We will not allow assumption of risk to masquerade as contributory negligence." 456 F.2d at 974. Similarly, the Second Circuit, under like circumstances in *Rivera* v. *Farrell Lines, Inc.*, 474 F.2d 255 (2d Cir. 1973), *cert. denied*, 414 U.S. 822, 94 S.Ct. 122, 38 L.Ed.2d 55 (1974), reached the same conclusion. There, a messman brought suit against the shipowner for injuries he had suffered from falling on a wet pantry floor covered with soapy water as a result of defective drains. He had continually but unsuccessfully complained of this condition to the ship's officers. The shipowner

defended on the ground that the messman's continuing to work in the light of such known dangers constituted contributory negligence, and the jury so found. The Second Circuit responded:

> The distinction between assumption of risk and contributory negligence is well established. In common law days the knowledgeable acceptance by an employee of a dangerous condition when and if such acceptance was necessary for the performance of his duties was assumption of risk. . . . Contributory negligence, on the other hand, connotes some careless act or omission on the part of the employee over and above that knowledgeable acceptance. . . . As the defense of assumption of risk has been abolished by statute . . . the first issue before us is whether the charge permitted assumption of risk to go to the jury in the guise of contributory negligence.
>
> The only theory of contributory negligence the record reveals . . . was the argument that appellant was careless in moving in and about the pantry, knowing the sloppy condition of the floors. This theory, however, was really assumption of risk masquerading under another name, because it allowed a finding of contributory negligence on the strength of appellant's knowledge that a dangerous condition in his line of duty existed and his working in that line of duty. . . . Thus the verdict must be set aside. . . .

474 F.2d at 257-58.

The Fourth Circuit, also, has concluded that holding an employee contributorily negligent because he knew of a dangerous condition and yet continued to work impermissibly charged him with assumption of the risk. In *Sessler* v. *Allied Towing Corp.*, 538 F.2d 630 (4th Cir. 1976), a barge employee used a "non-explosion proof" pump to remove gasoline from the barge, and an explosion occurred. The court held that the district court's finding of contributory negligence on the part of Sessler was "tantamount to holding Sessler negligent because he realized his job was dangerous but did it anyway. Since the [non-explosion proof] pump was the only pump available for his work, he could avoid using it only by refusing to do the job. . . . Viewed in this light, Sessler's conduct is properly character-

ized as assumption of risk, not contributory negligence." 538 F.2d at 632. Earlier, in *Smith* v. *United States*, 336 F.2d 165 (4th Cir. 1964), the fact that the injured longshoreman had known the ladder he used to exit a hold was defective was held not to render him contributorily negligent; to do so would charge him with " 'assumption of the risk under another name.' " 336 F.2d at 168. Only if there had been a safe alternative route available to Smith could his choice of the known-to-be unsafe ladder "possibly have indicated contributory fault."

[2] Our decisions, while they do not parallel as closely the facts before us, are in accord. In *San Pedro Compania Armadoras, S. A.* v. *Yannacopoulos*, 357 F.2d 737 (5th Cir. 1966), a seaman was ordered to climb into a tank that had a defective top. The top fell crushing his hand. Setting aside the district court's finding that Yannacopoulos was 50% contributorily negligent, we wrote:

> Since he had no choice but to use [the tank top] as it was, he cannot be made to assume the risk of injury when using the unseaworthy appliance in the regular discharge of his duties. . . . To do so would permit the rejected doctrine of assumption of risk to be applied under the label of contributory negligence.

357 F.2d at 741. In *Brock* v. *Coral Drilling, Inc.*, 477 F.2d 211 (5th Cir. 1973), we affirmed the trial court's holding that Brock had not been contributorily negligent for following orders to unload cargo after he had complained of the hazardous conditions present. In doing so, we recognized that "Brock's decision must be evaluated in light of his economic dependence on Coral for future employment." 477 F.2d at 215. In *Webb* v. *Dresser Industries*, 536 F.2d 603 (5th Cir. 1976) a seaman sent ashore to Alaska to pick up supplies requested appropriate boots for the errand, was refused, and while ashore, slipped on the ice and was injured. The trial court made no finding regarding contributory negligence, and we remanded for consideration of that issue because Webb might have been able to obtain boots on his own. In doing so, however, we noted:

> [T]he aperture for finding comparative fault on this basis [failing to minimize present dangers] is very narrow—the

> rule is confined to instances where there has been generous opportunities safely to correct the known dangerous situation, and a heavy burden of proof rests with the defendant. (footnote omitted)

536 F.2d at 609. Our review of these cases convinces us that Byrd does not fit within this narrow aperture. He had no opportunity to minimize the dangers caused by the ANTARES' rolling other than to stop work. In our judgment, holding him contributorily negligent for failing to do so, impermissibly charges him with assumption of the risk.

Appellee asserts, however, that *Mazzanti* v. *Lykes Bros. Steamship Co., Inc.*, 524 F.2d 961 (5th Cir. 1975), the only case upon which the district court relied in submitting the question of appellant's contributory negligence to the jury, is *contra* and controls. We disagree. Mazzanti, a longshoreman, was injured when he slipped and fell upon trash that had accumulated on the deck area. The district court found Mazzanti 75% contributorily negligent "becuase [he] should have reported the condition of the area to the gang foreman who could have requested that the area be cleaned by a cleanup crew or could have requested that aid be sent to the longshoremen's gang to assist them in cleaning the area." 524 F.2d at 962. After analyzing the ship's and Mazzanti's varying opportunities to correct the dangerous condition and concluding that the ship's crew was better able to do so than appellant, we directed that Mazzanti's contributory negligence be reduced to 50%. We also stated: "The alternatives available to [Mazzanti] in lieu of continuing work at the risk of harm to himself were to refuse to work or to report the condition and hope that cleanup assistance would be sent." (footnote omitted) *Id.* We conclude that *Mazzanti* does not control because of a critical factual difference between that case and the instant: Mazzanti had not reported the dangerous condition in order that it be corrected. Here, longshoremen complained repeatedly.

[3] Appellee next argues that the above-cited cases (other than *Mazzanti)* are inapposite in that they either concern seamen, as opposed to longshoremen, or that they predate the

1972 Amendments to the LHWCA and thus no longer apply. Although the 1972 Amendments to the Act effected several fundamental changes in the nature of longshoremen's compensation, those changes did not alter the impermissibility of the assumption of risk defense. *Gay* v. *Ocean Transport & Trading, Ltd., supra.* Gay also makes clear that under the amendments, seamen and longshoremen are to be treated alike for these purposes. Thus, we pointed to the House of Representatives Committee Report which stated:

> [T]he Committee intends that the admiralty concept of comparative negligence [governing seamen], rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable. (footnote omitted)

546 F.2d at 1237.

[4] Moreover, the Act is to be liberally construed to promote its compensatory purpose in favor of the injured employee. *Alabama Dry Dock & Shipbuilding Co.* v. *Kininess*, 554 F.2d 176 (5th Cir. 1977), *cert. denied*, 439 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1978); *Smith* v. *M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977). *See also United States* v. *Bender Welding & Mach. Co.*, 558 F.2d 761 (5th Cir. 1977). This reinforces the conclusion that the cases cited *supra*, prohibiting application of the "assumption of risk" doctrine under the rubric of contributory negligence, properly apply.

We conclude that the trial court erred in denying appellant's motion for directed verdict on the issue of contributory negligence and in reducing appellant's award of damages by 50%, the proportion of negligence the jury attributed to Byrd. Hence, we need not reach appellant's second argument, that the assignment of different percentages of contributory fault to the three longshoremen was irrational, or that Byrd could not, for not refusing to work, be charged with negligence equal to that of Reederei.

III.

Appellant also challenges the instruction that the jury exclude inflation from its damage calculations. Six years ago, in *Johnson* v. *Penrod Drilling Co., supra*, we squarely faced this question and held that juries should not be instructed to consider "future inflationary or deflationary trends in computing future lost earnings." 510 F.2d at 241. That decision has been criticized by members of our own bench. It is also inconsistent with the decisions of the majority of other circuits that have addressed the question without reference to state law and with the holdings of the state courts, with one exception, in ur jurisdiction. In addition, commentators generally have disfavored *Penrod's* result. Nonetheless, as Judge Wisdom stated in *Davis* v. *Hill Engineering, Inc.*, 549 F.2d 314, 332 (5th Cir. 1977), "[u]ntil *Penrod* is overruled . . . an inflation element cannot be included in damage computations." Thus, we decline to discuss the merits of the controversy and instead address the sole question before us: has *Penrod* been overruled?

[5] An en banc decision of our court may be overruled only by subsequent en banc consideration or by the United States Supreme Court. No en banc court has again addressed this question, but last year in *Norfolk Western Railway* v. *Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), the Supreme Court held that the effect of income taxes could be considered in determining damage awards. Responding to the argument that the future prediction of tax consequences is "too speculative and complex for a jury's deliberations," the Court stated:

> Admittedly there are many variables that may affect the amount of wage earner's future income tax liability. . . . But future employment itself, future health, future personal expenditures, future interest rates and *future inflation are also matters of estimate and prediction*. . . . [T]he practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the no-

> tion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury. (footnote omitted; emphasis supplied)

444 U.S. at 494, 100 S.Ct. at 758. The Second Circuit recently pointed to this language as indicating the Supreme Court's approval of the consideration of inflation in damage awards and held that inflation could be so considered. *Doca* v. *Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980). However, no Second Circuit decision *contra* bound the *Doca* panel; it reached its conclusion only after reviewing decisions of other courts, its prior decisions regarding the consideration of inflation in assessing damages, and the merits of the controversy. It did not hold that *Liepelt* compelled its result. We are not similarly free, and we agree that *Liepelt's* favorable dicta is only that. Thus, until the Supreme Court speaks more directly or we, as an en banc court decide otherwise, *Penrod* still applies: the district court did not err in instructing the jury not to consider the effects of inflation in assessing Byrd's damages.

Accordingly, we affirm in part and reverse in part. We vacate the judgment and remand to the trial court to enter judgment for appellant in the full amount, $125,000, assessed by the jury.

APPENDIX C

United States Court of Appeals
Fifth Circuit

June 24, 1981

No. 78-3064

Willie Mae BYRD, as Administratrix of
the Estate of Lawrence Byrd, Deceased,
Plaintiff-Appellant, Cross-Appellee,

v.

Heinrich Schmidt REEDEREI,
Defendant-Appellee, Cross Appellant.

Appeal from the United States District Court for the Middle District of Florida; Wm. Terrell Hodges, Judge.

Joel D. Eaton, Walter H. Beckham, Jr., Miami, Fla., Roger Vaughan, Wagner, Cunning, Vaughan & Genders, Tampa, Fla., for plaintiff-appellant, cross-appellee.

Fowler, White, Gillen, Boggs, Villareal & Banker, Nathaniel G. W. Pieper, Dewey R. Villareal, Jr., Tampa, Fla., for defendant-appellee, cross-appellant.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(5 Cir., 1981, 638 F.2d 1300).

Before GODBOLD, Chief Judge, and BROWN, AINSWORHT, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK and WILLIAMS, Circuit Judges.

By The Court:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc, 638 F.2d 1300, 5 Cir.

It Is Ordered that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX D

United States Court of Appeals
Fifth Circuit

Sept. 22, 1982

No. 78-3064

Willie Mae BYRD, individually and as administratrix of the Estate of Lawrence Byrd, deceased,
Plaintiff-Appellant, Cross-Appellee,

v.

Heinrich Schmidt REEDEREI, a foreign corporation,
Defendant-Appellee, Cross Appellant.

Widow brought suit under the Longshoremen's and Harbor Workers' Compensation Act against shipowner, seeking recovery for the alleged wrongful death of her husband. The United States District Court for the Middle District of Florida, at Tampa, Wm. Terrell Hodges, J., rendered judgment for plaintiff in the amount of half the damages assessed, and an appeal and cross appeal were taken. The Court of Appeals, 638 F.2d 1300, affirmed in part and reversed in part. On rehearing en banc, the Court of Appeals, Brown, Circuit Judge, held that: (1) plaintiff's objection to jury charge, precluding consideration of the effect of future inflation on an award of damages, was properly before the Court of Appeals, since a reading of the trial transcript showed that counsel for plaintiff attempted to create a record to challenge or at least find an exception to *Penrod*, and (2) under certain guidelines, evidence of wage increases due to inflationary trends may be introduced at trials in the Fifth Circuit.

Reversed and remanded.

Tjoflat, Circuit Judge, filed a concurring opinion.

James C. Hill, Circuit Judge, filed a dissenting opinion in which R. Lanier Anderson, III, Circuit Judge, joined.

Charles Clark, joined by Roney, Gee and Frank M. Johnson, Jr., Circuit Judges, dissented.

Joel D. Eaton, Walter H. Beckham, Jr., Miami, Fla., Roger Vaughan, Wagner, Cunning, Vaughan & Genders, Tampa, Fla., for plaintiff-appellant cross-appellee.

Fowler, White, Gillen, Boggs, Villareal & Banker, Nathaniel G. W. Pieper, Dewey R. Villareal Jr., Tampa, Fla., for defendant-appellee cross-appellant.

Appeals from the United States District Court for the Middle District of Florida.

ON REHEARING EN BANC

Before GODBOLD, Chief Judge, BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK and WILLIAMS, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

[1] Willie Mae Byrd was the plaintiff in a third party action for the wrongful death of her husband, Lawrence Byrd, arising under the LHWCA, 33 U.S.C. §§ 901 *et seq.*, and general maritime law. Mr. Byrd was killed when 3,000 pounds of cardboard cartons fell from the hold of a ship owned by the defendant, Heinrich Schmidt Reederei, and crushed his chest. At trial, the District Court denied Byrd's motion for directed verdict on the issue of contributory negligence, and also prohibited her from introducing testimony on inflation. The jury returned a verdict for $125,000, but found Mr. Byrd 50% contributorily negligent and reduced the award to $62,500. A panel of this Court, 638 F.2d 1300, reversed the District Court's denial of a motion for directed verdict and ordered the trial court to enter judgment for Byrd in the full amount of the damages assessed. The trial court also rejected the issue of

whether future inflation may be considered by the jury when assessing an award of future damages on the basis of this Court's decision in *Johnson* v. *Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (en banc). In an opinion issued concurrently with the present opinion, *Culver* v. *Slater*, 688 F.2d 280 (5th Cir. 1982), this Court held that, under certain guidelines, evidence of wage increases due to inflationary trends may be introduced at trials in this Circuit. Therefore, we remand this case for a new trial on Byrd's damages, in accordance with the principles of *Culver*, unreduced by any percentage for the contributory negligence of Mr. Byrd.

[2] Several arguments raised by the defendant in this case merit discussion. The defendant argues that this Court may not properly reach the inflation issue because Byrd did not introduce or proffer evidence upon which inflation could be considered. Given that Byrd was prohibited at trial from introducing testimony upon future inflationary trends, and in light of the instruction that the jury was not to consider inflation in determining future damages, both limitations created by *Penrod*, we need not closely examine either the probative weight of the evidence presented on inflation or the subsequent absence of a detailed recitation of reasons underlying Byrd's objection to the jury instructions. *See* F.R. Civ. P 51. In cross-examining the defendant's investment expert, Byrd attempted to ask questions about the effect of inflation rates on the bond market. The District Court, on the basis of *Penrod*, sustained the objections to that line of questioning. At that time, counsel for Byrd tried, to no avail, either to distinguish *Penrod* or to explain that doubts have arisen in the Circuit with regard to evidence on inflation. The court granted a recess, and the following discussion took place between counsel for Byrd and the trial judge:

THE COURT: . . . What you started . . . to pursue was the effect of inflation on the market generally. And at that point I sustained the objection, and would—and would and do sustain the objection.

COUNSEL: Alright, sir. Your Honor, I wish to proffer for the record some information . . . because to, in effect, require this person to reduce their investment for the future but not let them take into consideration the increase in value, the loss of the borrowing, the loss of the purchasing power of the dollar, is in effect to give a double reduction.

The reason this money—the reason that a person pays these dollars for a thousand dollar bond has to do with inflation. And to let that go in to reduce this person's recovery because they believe they will be able to get this amount of money in the future, in effect, causes a double reduction. Because at the end of 2007 that one thousand dollars she gets back will be worth five hundred dollars.

* * * * *

[COUNSEL FOR DEFENDANT: But hasn't that been laid to rest in *Penrod?*]

THE COURT: I understand—and he does, too—in the en banc decision of the Fifth Circuit.

* * * * *

COUNSEL: Well, let me proffer in the presence of the witness and ask if this is correct before the jury physically comes in the door. I believe that may be sufficient, Your Honor.

I believe the witness has told me that the current U.S. Government estimated rate of inflation is six and a half to seven percent for the coming year, that his company's estimated rate of inflation is seven and a half percent; that the lowest rate he, himself, has ever heard of in the past is between three and a half or four percent . . . and that in his opinion, based upon reading and other knowledge in the field, he believes the best that people can hope for in the future is a five percent rate of inflation. . . . We would proffer all that in evidence as indicating the minimum amount of rate of inflation that the plaintiffs should be entitled to, regardless, and we would take three and a half percent if that were proper.

THE COURT: Well, the proffer is in the record. It's not in evidence.

Reading the trial transcript, we are convinced that counsel for Byrd was attempting to create a record to challenge or at least find an exception to *Penrod*. Byrd's later objection to the instruction that the jury should not employ an estimated rate of inflation to increase damages must be viewed in the context of *Penrod's* shackles. While it is true that counsel for Byrd did not offer a lengthy explanation for his objection to the instruction, we find that the matter was sufficiently presented to the judge at trial and that all parties understood the dilemma—Byrd wanted the jury to consider inflation, and *Penrod* stood in the way. *See Culver, supra.* In short, we find that Byrd's objection to the jury charge is properly before this Court under F.R.Civ.P. 51.

REVERSED AND REMANDED

TJOFLAT, Circuit Judge, concurring:

Although I agree with the majority that the time has now arrived for reconsideration of *Johnson* v. *Penrod Drilling Company*, 510 F.2d 234 (5th Cir. 1975), I write separately to make clear that the majority opinion should be read as doing nothing more than overruling *Penrod's* flat proscription of competent, otherwise admissible evidence on inflation. Henceforth, the Federal Rules of Evidence alone will govern the admissibility of such evidence, and render appropriate a jury instruction on inflation commensurate with the evidence presented.

I.

Appellees are justified in pointing out that neither the Pretrial Stipulation, Record, vol. 1, at 13, nor the Pre-trial Order, Record, vol. 1, at 14, gives any indication that the plaintiffs sought to raise the inflation issue at trial. Indeed, plaintiffs rested their case without an offer of proof on inflation, which clearly would have been the most appropriate way to preserve

the *Penrod* question for appeal. Although appellants did not do all that they should have done to preserve the inflation issue, their proffer was sufficient to satisfy the Federal Rules of Evidence. *See* Fed.R.Evid. 103(a)(2). The proffer made during the cross-examination of the defendant's investment expert, Gerald Powers, was probably sufficient to establish a groundwork for appeal, although it should not be considered as a guide for the district courts.

On cross-examination, plaintiffs' counsel asked Powers: "Are you familiar with the general rates of inflation as predicted by the Federal Government?" Record, vol. 7, at 172. The court sustained the defendant's general objection. After an extended colloquy on whether the defendant had "opened the door" to inflation questions on cross-examination by putting the issue before the jury on direct, the court ruled that he had not, and then sustained the objection to further inflation inquiry on *Penrod* grounds. It should be emphasized that *at no time* did the defendant make a specific objection to the line of questining, or the subsequent proffer, as improper because they were beyond the scope of the direct examination. Contrary to the claim in the Supplemental Brief of Defendant on Rehearing En Banc at 7, the record shows that counsel's argumentation went exclusively to whether defendant had opened the door to questioning otherwise clearly barred by the *Penrod* rule of exclusion. Similarly, the record demonstrates that the court excluded such evidence solely on *Penrod* grounds, without any consideration of the potential objection that plaintiffs had rested their case and could not now delve into these matters. Record, vol. 7, at 172, 179, 181.

At that point, plaintiffs' counsel made a speaking proffer, in the presence of the witness, as to the rationale for including inflation in a damages award and various estimated rates of inflation. *See* Record, vol. 7, at 179-80, 182-83; Majority Opinion at 326. Defendant did not object contemporaneously to the adequacy of the proffer and did not challenge the qualifications of the expert to give this testimony. Nor did he seek re-direct examination on this offer of proof or offer any rebuttal of the

witness' "testimony" or its probative value. Thus, all these potential objections to plaintiffs' offer of proof must be considered to have been waived. *See* Fed.R.Evid. 103(a)(2). We agree, therefore, with the majority that counsel for plaintiffs did succeed in creating a record to "challenge or at least find an exception to *Penrod*," Majority Opinion at 326, although their effort to do so was tardy.

II.

I emphasize the limited nature of the court's holding today: evidence concerning the impact of inflation on recoveries of lost future wages will be admitted insofar as it conforms to the Federal Rules of Evidence, and a jury instruction on inflation will be appropriate if a predicate of competent, relevant and otherwise admissible evidence has been established. As the Ninth Circuit Court of Appeals has written, "[W]e allow the trier of fact in awarding damages to take into account only such estimates of future changes in the purchasing power of money as are based on sound and substantiated economic evidence, and as can be postulated with some reliability." *United States* v. *English*, 521 F.2d 63, 75-76 (1975).

Specifically, the trial court should ensure that the expert testimony concerning inflation meets the requirement of Fed-.R.Evid. 702:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Once rule 702 has been satisfied, the trial court should also exercise sound discretion to ensure compliance with Fed.R.E-vid. 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of

> unfair prejudice, confusion of the issues, or misleading the jury. . . .

This rule is particularly important with a complex issue such as inflation, where confusing expert testimony might well hinder rather than assist the trier of fact. The application of these evidentiary filters is critical if today's holding is to enhance the accuracy of damages awards in this circuit.

JAMES C. HILL, Circuit Judge, with whom T. LANIER ANDERSON, III, Circuit Judge, joins, dissenting:

For the reasons set forth in my opinion in *Culver* v. *Slater*, 688 F.2d 280 (5th Cir. 1982) (en banc), issued this date, I dissent from so much of the court's decision as authorizes a procedure other than that used in *Feldman* v. *Allegheny Airlines, Inc.*, 382 F.Supp. 1271 (D.Conn. 1974), *aff'd in relevant part*, 524 F.2d 384 (2d Cir. 1975).

For the reasons set forth in their dissenting opinions in 79-3985, *Culver* v. *Slater*, Judges CHARLES CLARK, joined by RONEY, GEE and FRANK M. JOHNSON, Jr., also dissent.

APPENDIX E

United States Court of Appeals
Fifth Circuit

Sept. 22, 1982

No. 78-3985

Ruth CULVER, *et al.*,
Plaintiffs-Appellants, Cross-Appellees,

v.

SLATER BOAT CO., *et al.*,
Defendants-Appellees, Cross Appellants.

EUROPIRATES INTERNATIONAL, INC., *et al.*,
Defendants-Appellees and Cross-Appellees-Appellants,

v.

ODECO DRILLING, *et al.*,
Defendants-Appellees Cross Appellants.

Wife and children of foreman of anchor-pulling crew brought maritime personal injury case arising out of foreman's death. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., entered judgment from which appeals and cross appeals were taken. The Court of Appeals affirmed as modified, 644 F.2d 460. On rehearing en banc, the Court of Appeals, Brown, Circuit Judge, overruling a previous case, held that: (1) prohibition of any consideration of inflationary factors in ascertaining damages award for loss of future wages is unfair to plaintiffs and would be overruled, and (2) in ascertainment of damages for loss of future wages, plaintiffs should be permitted to establish by factual economic and labor data, and expert testimony, that their income would probably continue to increase in response to inflation in future

years if they continue to work, and likewise, using economic and labor data and expert testimony, defendant should be permitted to rebut such evidence.

Reversed and remanded.

James C. Hill, Circuit Judge, filed opinion concurring in part and dissenting in part, in which R. Lanier Anderson, III, Circuit Judge, joined.

Charles Clark, Circuit Judge, dissented and filed opinion in which Roney and Gee, Circuit Judges, joined.

Gee, Tjoflat and Frank M. Johnson, Jr., Circuit Judges, dissented and filed opinions.

W. James Kronzer, W. W. Watkins, Houston, Tex., Frederick J. Gisevius, Jane M. Gisevius, New Orleans, La., for Ruth Culver et al.

Leonard Fuhrer, Alexandria, La., for amicus curiae Louis Ober.

Patrick A. Juneau, Jr., Lafayette, La., for amicus curiae Penrod Drilling.

Richmond M. Eustis, New Orleans, La., for Slater Enterprises, Europirates, Etc.

Drury, Lozes & Curry, Felicien P. Lozes, New Orleans, La., for Gulf Overseas Ser. Corp.

J. Walter Ward, New Orleans, La., for Ocean Drilling.

Mat M. Gray, III, New Oeleans, La., for St. Paul Fire.

Appeals from the United States District Court for the Eastern District of Louisiana.

ON REHEARING EN BANC

Before GODBOLD, Chief Judge, BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., HENDERSON, REAVLEY, POLITZ,

HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK and WILLIAMS, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This case comes before us on rehearing en banc to consider whether the holding of this Court in *Johnson* v. *Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (en banc), that neither proof, nor argument, nor jury instructions concerning inflationary factors may be considered or used in maritime, Jones Act, and FELA personal injury and wrongful death actions, should be overruled. After careful consideration of this singular issue, we overrule *Penrod* and remand this case to the District Court.

I.

Bound by Penrod

The facts leading up to this appeal have already been outlined by this Court in the panel's opinion, 644 F.2d 460, 462-63 (5th Cir. 1981). Briefly, Curtis Culver was killed while working on a vessel owned by Slater Boat Company. The vessel upon which the accident took place was engaged in moving the drilling barge OCEAN QUEEN from its location on the Outer Continental Shelf to a new location. The fatal injury occurred before the barge was actually moved. Culver's widow and children brought suit under the Jones Act, 46 U.S.C. § 688, the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.*, and the general maritime tort and negligence theory. The jury found negligence on the part of Gulf Overseas Marine Corporation (Culver's employer), Euro-Pirates International (the charterer of the vessel), and Ocean Drilling & Exploration Company (the owner of a barge involved in the fatality), and no contributory negligence on the part of Culver.

On the issue of damages, the District Court allowed testimony concerning discount rates and the earning power of money invested in low risk bonds. The jury was instructed to "discount the total amount" of any award by a percentage that represented an appropriate rate of interest. In answer to the

spcial interrogatory submitted asking what discount percentage rate was applicable, the jury filled in "25%". The trial judge, on the basis that the jury obviously misunderstood the interrogatory, substituted 9.125%, the only other rate put into evidewnce by the defendant. In accordance with *Penrod*, the District Court did not allow testimony, charges, or interrogatories to be submitted on the effects of inflation on probable loss of future income.

In short, Culver was not permitted to show any likely increase in future earnings due to inflation. But the award was to be discounted by an interest factor reflecting anticipated inflation.

Culver initially appealed the judgment, raising five issues: (i) should *Penrod* be overruled?; (ii) if *Penrod* is not overruled, should evidence of probable non-inflationary future wage increases (e.g., merit raises) be prohibited?; (iii) can a District Court disregard a jury finding regarding the discount rate and apply one based on opinion testimony?; (iv) was the testimony of culver's adverse witness sufficiently clear that the court could apply that witness' opinion of the discount rate?; and (v) can a District Court enter a final judgment for damages applicable to all beneficiaries in a maritime death action that is incapable of apportionment among the various beneficiaries? Cross-appeals were brought by all of the defendants raising several additional issues.

Oral argument was heard by a panel of this Court, and the District Court judgment was affirmed as slightly modified. Specifically, the panel considered itself bound by *Penrod's* holding that "the influence on future damages of possible inflation or deflation is too speculative a matter for juridcal determination," 644 F.2d at 643, *quoting Penrod*, 510 F.2d at 241. And in accordance with *Byrd* v. *Reederei*, 638 F.2d 1300 (5th Cir. 1981) (rehearing en banc granted), the panel rejected Culver's argument that the Supreme Court overruled *Penrod* in *Norfolk & Western Railway* v. *Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980). Likewise, the panel found no

error in the trial judge's refusal to allow Culver to argue likely future wage increases on the basis of merit, because no evidence was offered to show that such an argument was warranted and in addition, such evidence was "merely an indirect way of putting inflation factors into evidence before the jury [which is] not allowed under *Penrod.*" 644 F.2d at 464.

Culver filed a petition for panel rehearsing, and a separate petition for rehearing en banc, as required by ur rules, raising two closely related issues: (i) should *Penrod* be overruled and (ii) does *Penrod* prohibit a trier of fact in this Circuit to receive evidence of non-inflationary factors, such as probable merit raises and productivity increases, in arriving at future losses? This Court, voting for rehearing en banc, determined that the time was ripe for reconsideration of the rule in *Penrod* pertaining to the "inflation factor" in damages awards. Although Culver's brief to this court on rehearing en banc addressed primarily issue (i), whether proof and argument concerning inflationary factors should be permitted in this Circuit, issue (ii) is also involved since automatic exclusion of evidence of probable merit raises has resulted from a misreading of *Penrod.* The defendants argue that *Penrod* should be upheld, and, in addition, contend that Culver waived the right to relief on the inflation issue by failing to make an offer of proof regarding the likelihood of inflation.

A.

[1] Briefly, we will address the defendants' claim that Culver waived the right to raise the issue of inflation by his failure to make a formal proffer at trial. The defendants called as a witness an investment banker who specialized in bonds. On cross-examination, Culver's attorney attempted to ask whether people earned more money over the years of their employment due only to productivity. An objection to the question was sustained. After several more questions, all counsel approached the bench where the jdge made it clear that the type of evidence excluded by *Penrod* woul not be permitted in court. The jury was then temporarily excused,

and Culver's attorney told the judge that he wanted to ask the expert whether the principal of a bond would be worth less in the future. The trial judge replied that deflation was as likely as inflation, and any testimony as to such factors would be pure speculation. The judge concluded that "I will not permit you to intorduce any evidence before the jury relative to inflation in view of the present law that I am bound by which is the *Penrod* case." Before closing argument, and before the jury returned, the judge explained that:

> Plaintiff's counsel will not be permitted to argue that the jury should take into consideration inflation, nor will it be permitted to make an indirect argument which would achieve the same purpose of permitting him to argue inflation by attempting to indicate that it could be expected that plaintiff would receive job promotions or merit increases.

Again, the judge mentioned the prohibitions of *Penrod*. Given this flat prohibition against introducing testimony (or making argument) as to future inflationary trends on the basis of *Penrod*, it makes no sense to argue that Culver may not raise this issue on appeal simply because he did not proffer an expert on inflation. Reading the trial transcript, it is obvious that a record was being created to challenge or at least find an exception to *Penrod*. We find that the matter was sufficiently presented to the judge at trial and that all parties understood the dilemma—Culver wanted the jury to consider inflation, and *Penrod* stood in the way.

B.

The most problematic issue on this appeal remains: Should *Penrod* be opverruled so as to allow parties to present proof and argument concerning inflationary factors to the trier of fact? Our analysis will begin with a brief review of the *Penrod* decision. In order to illustrate graphically the implications of *Penrod* and why it has to be overruled, we will discuss many of the cases in this Circuit where *Penrod's* prohibitions were effective. Next, we will summarize the criticisms of *Penrod* which come from other circuits as well as commentators. As

our analysis proceeds, it will become clear that the problem is one of fairness to plaintiffs as well as defendants in the trial process. Personal injury awards, once they have been calculated on the basis of projected income and life expectancy, are padi immediately to the plaintiff. It is well-known that if a plaintiff (or his beneficiaries) receives a lump-sum award, totaling the income that the plaintiff would have received throughout the rest of his work life, that money can be invested so as to yield a far greater amount than the initial award. This would be unfairly liberal to the plaintiff. Consequently, the law traditionally permits introduction of testimony, usually by an expert in financial matters, that the lump-sum should be discounted by a factor equal to the interest rate which could likely be earned on a relatively safe investment by an unsophisticated investor. The total projected earnings are thus reduced to the present cash value. However, it will be demonstrated that in an inflationary economy, discounting an award in this manner results in unfairness to a plaintiff or his beneficiaries. When a discount rate is applied to an award in an economy where wage-earners typically receive cost of living increases each year due to inflation, the plaintiff will not be adequately compensated for his loss of future income—inflation will erode the value of the award, and no adjustment for cost of living can be made even though wages continue to increase throughout the economy. On the other hand, if courts respond to this dilemma by refusing to apply a discount rate, as some have, the result would be unfairness to defendants. Quite simply, plaintiffs are to be compensated, by a culpable tortfeasor, but should not be over- or under-compensated. Likewise, defendants found liable should pay no more or less than the amount a plaintiff lost because of the injury. Keeping in mind the goal of fairness to both sides of a controversy, this opinion will consider alternatives and possible guidelines for use in this Circuit. We will establish a flexible approach to the problem which should result in fairness regardless of the economic circumstances that exist at the time of trial. In the process, we overrule *Penrod*.

II.

Prolegomena

It is crucial to keep in mind that this is really an economic, and not a legal, problem. The likelihood of future wage increases, whether given on the basis of productivity, merit advancement, or inflation, or a combination of them, does not have anything to do with the law. The legal question whether such matters should be considered by the courts is a foundational policy question, the answer to which will be influenced by recourse to the financial and economic community. At trial, the issue may well be a legal credibility of witnesses or competency of evidence, but a pronouncement that inflation is speculative or that workers will or will not receive productivity and merit raises is essentially an economic statement, not a declaration of law.

If we consider, as an example, a person totally and permanently injured by a defendant's negligence, the injured worker is entitled to the equivalent of his lost future earnings. The law decides that much, and the question remains how much money should be given to him now. Once a lump-sum determintion is made, it is clearly unfair to give him the whole amount, because even an unsophisticated investor could earn a great deal in interest. However, in predicting how much money this worker will likely receive throughout the remainder of his work-life, we must consider the likely increase in wages he would have received. These will include possible advancements from one position to another, any raises due to company productivity, or other merit increases. In addition, in an inflationary economy, we must consider projected cost of living increases which are given by an employer to offset in part the effects of inflation. Each of these factors must be carefully distinguished, since they arise from wholly different causes. Although these factors may not all be present in a particular case, each must be considered in computing the total amount of likely earnings *before* a discount rate is applied to reduce that amount ot its present cash value because of invest-

ment potential. The goal, albeit ideal, is that if the injured worker has a 20-year work-life expectancy, and he invests his lump-sum award in relatively risk-free investments, he will receive in the nineteenth and in the twentieth year roughly the same amount as if he had worked each of those years. The goal is not, it must be made clear at the outset, to *protect* the lump-sum award from the effect of inflation. Rather, before determining how much now needs to be paid, the goal is to assure the plaintiff the equivalent of the total of all of his future wages, including those likely to be given/received in the form of cost of living increases in response to inflation.

III.

The Prohibitions of Penrod

In *Johnson* v. *Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (en banc), we recognized "the likelihood that inflatin could become a predictable condition for the future," but we were not able to "so surely discern the shadow of inflation as a coming event as to warrant requiring its inclusion in a present rule for calculating future damages." 510 F.2d at 236. Quoting the full initial panel opinion in *Penrod*, we expressly disapproved "the district court's attempt to take into account, in computing the plaintiffs' future lost earnings, inflationary trends in this nation's economy for the next several decades." 510 F.2d at 241. The "influence on future damages of possible inflation or deflatiion is too speculative a matter for judicial determination." *Id.* Therefore, triers of fact "should not be instructed to take into account future infaationary or deflationary trends in computing future lost earnings, nor should the jury be advised to consider such alternative descriptions of inflationary and deflationary trends as the purchasing power of the dollar or the consumer price index." *Id.*

The defendants and others have suggested that *Penrod* could be "modified", "explained", or watered down by this Court, but not overruled, so that adjustments could be made in individual cases where the influence of inflation was not

speculative. However, if fairness requires that we allow some evidence of inflation properly to compensate plaintiffs and avoid windfalls to defendants, any hope of "distinguishing" or "explaining away" *Penrod* crumbles in the face of *Penrod's* own words—inflation and deflation are too speculative for judicial determination, triers of fact should not take into account future inflationary or deflationary trends, juries should not consider changes in the purchasing power of dollars or the consumer price index, and judges should not undertake to instruct juries on such ideas. The prohibition on such evidence could not be clearer.

To argue, as the defendants do, that *Penrod* forecloses only consideration of *future* economic trends, while it allows evidence of past inflation, is to miss the point. The significant basis for predicting future inflation or deflation is *past* inflation or deflation. And the effect of past inflation alone, under a rule forbidding consideration of likely future inflation, leaves economically eclipsed a significant portion of the amount of money the wage-earner may receive in the future.

Even if it were possiblet isolate *Penrod* and analyze its terms in an academic vacuum, to reach the conclusion that evidence of inflation is permissible in the Fifth Circuit so long as the jury is not permitted to "speculate" as to the "influence" on future damages of "possible" inflation or deflation, the result of this exercise would be unworkable as a practical matter. For in practice, *Penrod* has placed a prison-like wall between any evidence of likely inflationary or deflationary trends (and argument or instruction thereon) and the courtrooms of the Fifth Circuit. Our decisions since 1975 on this issue have merely served to place barbed wire on top of the wall. Moreover, it is likely that in other cases, as in this one, evidence of probable increases in wages due to merit or productivity has been kept out of the jury room unwittingly because of *Penrod's* prohibitions. Economic data is readily available concerning past average annual wage increases of workers in the United States, and such data is often broken down into particular professions and geographic areas. But it is difficult to determine the percen-

tage of those increases given for merit-productivity and distinguish the percentage representing cost of living increases in response to inflation. Many plaintiffs have thus been unable to scale *Penrod's* wall and introduce evidence of non-inflationary wage increases, even though such increases are theoretically unaffected by inflation, and thus evidence of such increases should not have been prohibited.

IV.

Penrod in Practice

In our determination of whether *Penrod* ought to be overruled, it is important not only to consider what *Penrod* says, but also what this Court through the years since 1975 has said it says. We will look first to the recent cases arising in this Circuit applying *Penrod*. In *Davis* v. *Hill Engineering, Inc.*, 549 F.2d 314 (5th Cir. 1977), this Court reduced the District Court's award of $628,991 to $425,321 for the total loss of the plaintiff's future earning capacity, because the District Court increased the basic damage award, prior to discounting to present value, to offset wage and price inflation. The plaintiff's expert was unimpeached, and the defendants had no opposing expert. The trial judge was thus free to rely on the expert's testimony, and was apparently convinced of the need to allow over $200,000 to offset expected wage increases due to inflation. 549 F.2d at 331. Nevertheless, we held that until *Penrod* is overruled,

> an inflation element cannot be included in damage computations, either in the form of [i] calculating loss of future earnings without discounting to present value or of [ii] increasing the basic damage award, prior to discounting, with a figure representing the projected inflation rate. The former [i] is the *Beaulieu* [v. *Elliott*, 434 P.2d 665, 671 (Alaska 1967)] method, the latter [ii] the District Court's method in this case.

549 F.2d at 332 (brackets added). Judge Wisdom Acknowledged that other circuits consider inflation as a factor in computing future earnings damages, an approach that "more accurately [reflects] loss of future earnings than does a dis-

counted figure because it prevents inflation from eroding the damage award." 549 F.2d at 332. Alas, he conceded, his hands were tied by *Penrod. Id.*

In *In the Matter of S/S HELENA*, 529 F.2d 744, 753 (5th Cir. 1976), this Court remanded for recalculation the District Court's damages award because an inflationary rate was assumed and applied. In determining the damages for loss of support payable to the wives of deceased crew members of a vessel, the trial judge stated:

> I have to some degree offset discount to present value by the effects of inflation and a likely rise in decedent's earnings resulting from increases in the general wage level. I have assumed a discount rate of 5%, and a three per cent inflationary level thus making the net discount rate 2%.

529 F.2d at 753, *quoting* 329 F. Supp. 652 at 660. Other calculations of the damages for loss of support also "seemed to be based on the inflation and present value factors, the expert testimony of an economist as to expected future earnings, and the present cost of annuities that would pay monthly amounts increasing at the estimated rate of inflation." 529 F.2d at 753. Quoting *Penrod*, we remanded to District Court for a more detailed calculation of the damages. On remand, the District Court filed supplemental responses heeding our instructions, and *Penrod* was again faithfully followed. *Matter of S/S HELENA, sub nom. Sincere Navigation Corp.* v. *United States*, 547 F.2d 255, 256 (5th Cir. 1977). The element of inflation was eliminated and the damages recomputed. *Id.*

In *Higginbotham* v. *Mobil Oil Corporation*, 545 F.2d 422, 433-35 (5th Cir. 1977), *rev'd and remanded on other grounds*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), this Court reviewed the District Court's use of a 5% annual straight line estimated salary increase to calculate the probable future earnings of the deceased. Although the trial judge stated that he did not take into consideration "the decreasing purchasing power of the dollar," we held that under *Penrod* "the plaintiff must bear the difficult burden of proving what portion of the increases would have beeen given other than as an automobile

hedge against inflation." 545 F.2d 434-35. The defendants, wielding the mighty sword of *Penrod*, made the factually unsupported argument that "it is common experience that annual 'raises' are for the most part cost of living wages," therefore a 5% straight line annual increase amounted to a hidden inflation-based award. 545 F.2d at 434. While common experience likewise tells us that some portion of pay raises reflect performance and experience, the plaintiff's expert failed to distinguish between cost of living or inflationary increases and rewards for experience or productivity. 545 F.2d at 435. Thus we rejected the District Court's award based on the 5% future earnings factor, and remanded to give the plaintiff an opportunity to walk the straight and narrow of *Penrod*. Judge, now Chief Judge, Godbold, in his partial dissent, observed that in "innumerable other contexts we accept the events of the past as the basis for an inference as to what the future will hold." 545 F.2d at 437 (Godbold, J.). "Yet we would not permit consideration of evidence that a particular plaintiff had received a $200 per year increase in pay every year for 20 years, unless he could divide it up into 'productivity' pay and 'economic change pay.' " *Id.* (Godbold, J.).

> In this single area of projecting future earnings we deny ourselves the best evidence available on the asserted ground that it is not sufficiently reliable, and, in the name or reliability we mandate the artificial conclusion that one will earn the rest of his life what he is earning on the day he is killed or injured. The only thing certain about this is that it is certain to be wrong.

Id. (Godbold, J.).

In *Menard* v. *Penrod Drilling Company*, 538 F.2d 1084, 1089 (5th Cir. 1976), the plaintiff's economic expert estimated that, apart from the possibility that plaintiff might advance through the ranks of his employer, a worker "would have to get at least 2% per year, on the average, increase to maintain the same buying that he has to-day." A discount rate of 4½% was selected by the expert. *Id.* Because no objection was made, the jury was actually permitted to consider future inflation as a factor in calculating damages. One member of this Court's

panel observed that although this was not plain error under *Penrod* had an objection been made. *Id.* (Gee, J., concurring).

Continuing our historical journey into the past, this Court in *Lacaze* v. *Olendorff*, 526 F.2d 1213, 1222 (5th Cir. 1976), *reh'g en banc granted*, 526 F.2d at 1223, found error in the trial court's overruling an objection to expert testimony on future lost earnings because the expert included a 3% inflation rate in his calculations. On the basis of *Penrod* the case was reversed and remanded on the issue of damages. 526 F.2d at 1223.

In *Weakley* v. *Fischblach & Moore, Inc.*, 515 F.2d 1260 (5th Cir. 1975), a diversity suit arising out of an electrical explosion in Texas, we affirmed the judgment of the District Court even though the jury considered both future productivity and future inflation in assessing a $300,000 award for lost earning capacity. For this Court, Judge Wisdom observed that although this "Court has writ large its disapproval of calculating future damages by reference to predictions of future inflation," Texas law applied, and juries in Texas are permitted to weight evidence for future damages, 515 F.2d at 1266-67, citing *Penrod*. In a similar federal cause of action we may be certain that this Court would have reversed a judgment based on such a "speculative" jury finding.

Again, specificaly on the basis of *Penrod*, we concluded in *Petition of M/V ELAINE JONES*, 513 F.2d 911, 912 (5th Cir. 1975) *cert. denied*, 423 U.S. 840, 96 S.Ct. 71, 46 L.Ed.2d 60 (1975), that the District Court erred by including a 2% per year cost of living increase in the computation of loss of future earnings. We announced that "the trier of fact should not be instructed to take into account future inflationary or deflationary trends in computing future lost earnings."

In *Standefere* v. *United States*, 511 F.2d 101 (5th Cir. 1975), the District Court, sitting without a jury, awarded damages to a plaintiff for loss of future earnings and included an inflationary factor of 5.5%; in addition, the award of future medical expenses included an inflationary factor of 4.5%. Because *Penrod* foreclosed any consideration of inflation in computing such

damages, the District Court's decision was reversed and remanded for a recomputation of damages.

Robertson v. *Douglas Steamship Company*, 510 F.2d 829 (5th Cir. 1975), stands as yet another example of how we applied the *Penrod* strait-jacket. In accordance with the trial court's instructions, the jury divided the plaintiff's award into (i) the amount of basic damages and (ii) the amount of damages sustained "as a result of loss of future wage increases or inflation or decrease in the purchasing power of money." 510 F.2d at 836-37. Of course, the second part of the award wa sreversed, even though it is possible that a portion of that element was awarded due to likely merit or productivity increases not based upon inflation or cost of living adjustments. Thus we see that although *Penrod* was not intended to eliminate evidence of future wage increases on the basis of merit or productivity, the practical effect of *Penrod* is often to throw the baby of future merit increases out with the inflationary washtub waters.

Finally, on the very day that *Penrod* was published, this Court, in *Law* v. *Sea Drilling Corporation*, 510 F.2d 242, 251-52 (5th Cir. 1975) *on reh'ing*, 523 F.2d 793 (5th Cir. 1975), held that the District Court's allowance for additional inflationary cost of living increases in the decedent's income over the years before his death, upon which the trial judge based his reasonable expectation that the decedent's income would have continued to rise, probably reflected increases due to both merit and productivity and not just cost of living increases. Nevertheless, because an element of inflation was considered, *Penrod* was dispositive.

In all of the above discussed cases, this Court by both its actions and its words, flatly prohibited any consideration of inflation, whether in evidence presented, in jury instructions or in final argument, without regard to the cogency or persuasiveness of the evidence offered to prove that inflation, to some extent, will likely occur. Swept unthinkingly before *Penrod* also were merit-productivity increases. Thus stands the law in this Circuit, until today.

In our attempt to assess the impact of *Penrod* in this Circuit, not only is it necessary to consider our own appellate opinions, as we have done above, but it is also helpful to review some of the District Court opinions where the tentacles of *Penrod* were perceived and predictably effective. *In Complaint of Metcalf*, 530 F.Supp. 446 (S.D. Tex. 1981), the District Court stated emphatically that in its award for loss of earnings in the future, any "future inflationary or deflationary effect on earnings is not to be considered." 530 F.Supp. at 458, *citing Penrod*. Likewise, in *Kratzer* v. *Capital Marine Supply, Inc.*, 490 F.Supp. 222 (M.D. La. 1980), *aff'd* 645 F.2d 477 (1981), the plaintiff produced an economist who testified as to lost wages predicated upon an inflation factor and an increased productivity factor. The District Court simply cited *Penrod* and stated that there "was no evidentiary justification for these factors, and the Court declines to accept them, and as noted, utilized a discount figure of 6 percent with no other factors in computing lost wages." Again, we see how *Penrod* often operates to prohobit not only evidence of likely of inflation, but also evidence of likely merit or productivity wage increases. In *McLean* v. *United States*, 446 F.Supp. 9 (E.D. La. 1977), the plaintiff carefully met his burden of proof by establishing a "productivity" factor of 5.7% on the basis of past merit and change in job title increases over his pervious years of employment. Because that factor was in no way compensation for inflation, evidence thereof was admissible under *Penrod*. 446 F.Supp. at 13, 14. In *Thompson* v. *Offshore Co.*, 440 F.Supp. 752 (S.D. Tex. 1977), the District Court announced that in calculating a decedent's future earnings, any future inflationary effect on wages is not to be considered. 440 F.Supp. at 762. Finally, in *Hamilton* v. *Canal Barge Co.*, 395 F.Supp. 978 (E.D. La. 1975), allowance for inflation or increased cost of living was denied in light of *Penrod*, and for the additional reason that the diminution in the purchasing power of an award, caused by inflation, is not an item of damage caused by death or by prepayment of future wages. 395 F.Supp. at 987. However, the District Court did allow a 4% annual increase factor on the basis of skill and productivity. *Id.*

Nesmith v. *Texaco, Inc.*, 491 F.Supp. 561 (W.D. La. 1980), stands out as an anomaly to the law of *Penrod*. In startling contrast to the usual acceptance of *Penrod's* rejection of evidence of inflation, the District Court interpreted *Norfolk & Western Railway* v. *Liepelt*, 444 U.S. 490, 100 S.Ct., 755, 62 L.Ed.2d 689 (1980), to say that "in arriving at an award for future loss of earnings the very factors disapproved in [*Penrod*] should now be considered." 491 F.Supp. at 564. While the court was "mindful of the fact that this interpretation of *Liepelt* may be erroneous, and [*Penrod*] may still bar the door to speculative damages as to factors other than income taxes in a case of future loss from personal injuries," the plaintiff was permitted to present expert testimony that the growth rate for wages based upon inflationary factors in the plaintiff's job and geographic area will be approximately 6% over the next 30 years. 491 F.Supp. 564, 565 n.4. This attempt to break the bonds of *Penrod* resulted in an appeal, disposition of which is being held pending the outcome of the present opinion and *Byrd*, *see* note 1.

The cases discussed in this section demonstrate the absolute prohibition on any consideration of inflationary or cost of living trends in the courts of this Circuit. District Court judges have found themselves under a duty, imposed by *Penrod*, to prevent experts in their testimony, and attorneys in their arguments, from even mentioning economic trends that would effect future wage increases. Likewise, in their instructions to the jury, District judges have been careful not to mention inflation as a factor in computing damages, or, where inflation was mentioned, the purpose was to explain to the jury that they should *not* consider inflation in their computations. In those cases where the jury was permitted to consider the effect of future inflation on damage awards, either because they heard testimony by an expert or because they heard testimony by an expert or because the trial judge instructed them to consider inflation, wer have reversed the judgment and, in most cases, remanded for a new trial. In non-jury cases, the District Court judges have not been permitted to consider inflation in their

assessment of damages. Even where plaintiffs have clearly limited their evidence (as to inflation) to likely cost of living increases, thereby carefully avoiding any inference that the total award should be somehow "protected" from inflation irrespective of wage increases, the evidence has been rejected. In short, *Penrod* in practice has been a firm, inflexible standard that we have been unable to explain or interpret away. The standard is simple: no evidence of inflation may be presented to the trier of fact, regardless of how expert the testimony, how understandable the presentation, or how fair to the parties. Argument of counsel is also forbidden, as is jury instruction by the Court. This standard has at times been so overwhelming that it has prohibited evidence that should have been allowed, such as evidence of likely wage increases based upon merit or productivity, either on a misreading of *Penrod* or a perceived (and sometimes actual) impossibility of separating out inflationary elements from admissible merit-productivity increases. Quite possibly, an employer may take into account rising inflation in his decision to grant promotions, and it would be impossible for anyone, expert or otherwise, to distinguish that part due to merit *only* and determine the percentage amount of the raise due wholly to non-inflationary factors.

V.

Penrod and Other Circuits

Worthy of our consideration is how our sister circuits perceive *Penrod*. In 1975 the Eighth Circuit, *citing Penrod*, was able to say that the

> federal circuits that have faced the issue in cases involving federally created claims, governed by federal rather than state law, have for the most part rejected testimony, jury instructions or trial court consideration of future inflationary trends in damage assessment.

Johnson v. *Serra*, 521 F.2d 1289, 1295-96 (8th Cir. 1975), *aff'd on remand*, 586 F.2d 1291 (8th Cir. 1978). More recently, however, in the trend toward increasing consideration of inflation, *Taenzler* v. *Burlington Northern*, 608 F.2d 796, 800 n.9

(8th Cir. 1979), cited *Penrod* but declined to follow its approach. Expert testimony on future wage increases, when limited to future trends in earnings of a parcitular group of employees, thus avoiding the excessively general national inflation rate, was found to be acceptable in trial courts. 608 F.2d at 801.

Feldman v. *Allegheny Airlines, Inc.*, 524 F.2d 384 (2d Cir. 1975), a case arising under Connecticut law, cited with approval Judge Friendly's earlier assessment of inflation:

> There are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity, and it is scarcely to be expected that the average personal injury plaintiff will have the acumen to find investments that are proof against both inflation and depression—a task formidable for the most expert investor.

524 F.2d at 388, *citing McWeeney* v. *New York, New Haven and Hartford Railroad*, 282 F.2d 34, 38 (2d Cir. 1960) (Friendly, J.). The computation by trial Judge Blumenfeld of the discount rate by offsetting the anticipated rate of earnings on a prudent unsophisticated investment by an inflation factor was approved. This computation, subtracting the assumed inflation rate from the rate of interest on a safe investment (the traditional discount rate), yields an "inflation-adjusted discount rate." Judge Friendly, a member of the panel in *Feldman*, was not completely satisfied with this result—*Penrod's* emphasis on "the plethora of uncertainties" that accompany testimony regarding inflationary trends was contrasted with the trial court's apparent construction of "an iron-clad guaranty against the unkonwn and unknowable futur effects of inflation." 524 F.2d at 392 (Friendly, J.) concurring). Such protection against inflation is *not* enjoyed by the millions of Americans on fixed pension or investment income, or even by the average worker whose wages do not keep up with inflation. This highlights a weakness in the *Feldman* approach: it assumes that wage increases will mirror inflation. *Id.* Judge Friendly thus predicted that *Feldman* "will not constitute a

precedent on the inflation problem in a case arising under federal law." 524 F.2d at 393, (Friendly, J. concurring).

More recently, in a suit brought by an injured cargo checker against a stevedore and a shipowner (neither was his employer), pursuant to the LHWCA, 33 U.S.C. §§ 901 *et seq.*, the Second Circuit carefully considered the question whether and to what extent an award for lost future wages should be adjusted because of inflation. *Doca* v. *Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980), *cert. denied*, 451 U.S. 971, 101 S.Ct. 2049, 68 L.Ed.2d 351 (1981). *Penrod* as well as similar cases in the Third and First Circuits were identified as unsound minority views, 634 F.2d at 36. Broad agreement was perceived among economists that inflation "is a dominant factor on the current economic scene and, despite episodic recessions, is likely to be so for the foreseeable future." 634 F.2d at 37.

The District Court in *Doca*, 474 F. Supp. 751, 758 (S.D.N.Y. 1979), found that the plaintiff was entitled to recover $352,560, "representing his future loss of earnings considering both probability of continued inflation and a discount to present value." The extent to which inflation was considered was unspecified, and no computation was provided by the District Court. 634 F.2d at 34. On appeal, the plaintiff urged that the trial judge used a discount factor of 1%, an inference drawn by comparing the difference between the award given and the plaintiff's own projection of future lost wages. 634 F.2d at 34 & n.4. The defendants objected to the court's computation on the grounds of lack of evidence to support an estimate of future inflation and argued that any adjustment for inflation is impermissible. 634 F.2d at 34-35.

The Second Circuit in *Doca* described two basic approaches as to how inflation could be considered. First, the question of inflation rate may be submitted to the fact finder in one of three ways: (i) by allowing expert opinion, (ii) by requiring the fact finder to apply its own knowledge, or (iii) by permitting the fact finder to apply its own knowledge together with expert testi-

mony. Each of the three contemplate that a separate determination as to inflation is to be made in each case. Second, a rule of law may be adopted that focuses on the somewhat constant relationship between inflation and interest rates, as in the Alaska Supreme Court's view that the inflation rate should be assumed to equal the interest rate, thereby eliminating the discount to present value. 634 F.2d at 38-39. The *Doca* Court was not prepared to specify any particular methodology:

> If litigants prefer to offer evidence as to future rates of both inflation and interest, they are entitled to do so . . . .
>
> We emphasize that we are not requiring the use of an inflation-adjusted discount rate . . . . Litigants are free to account for inflation in other ways, or, if they use the adjusted discount rate approach, to offer evidence of a rate [other] than 2%.

634 F.2d at 39-40. The District Court's award was remanded for reconsideration for two reasons: (i) if a 1% adjusted discount rate was used, it was too low since 2% is the "true cost of money appropriate for use in a computation to determine the present value of lost future wages," and (ii) the District Court took into account a post-trial wage increase based upon cost of living, therefore duplicative consideration was given to the impact of inflation. 634 F.2d at 40.

Feldman, supra, approved the use of an "inflation-adjusted discount rate" of 1.5%. 524 F.2d at 387. The purpose of the method used in *Feldman,* and approved as one possible technique in *Doca,* was to determine the "real yield" of money—that portion of interest gained on virtually risk-free investments which represents only the real growth of the investment and not the losses due to future inflation. The theory is that the "real yield" of money is roughly 2% in any year, because in periods of high inflation, interest rates will be a bit higher, and in low inflationary periods, the interest rates will still be a littl above the rate of inflation.

Doca recognized the disagreement among economists over the validity of the assumption that the real rate of interest is constant and consequently independent of inflation, but noted

that various economic studies of similar time frames have estimated that the real rate of interest was between 1.5% and 3%. 634 F.2d at 39 n.10.

VI.

Penrod and Some Commentators

In 1977, one commentator—with an error in timing—predicted that "the Fifth Circuit soon could decide . . . that *Penrod* is 'substantively indefensible.' " This was precipitated by Judge Wisdom's concurring opinion in *Freeport Sulphur Co.* v. *S/S HERMOSA*, 526 F.2d 300, 311 (5th Cir. 1976) (Wisdom, J., concurring). Judge Wisdom there expressed his dissatisfaction with *Penrod* and identified the inconsistency in this Circuit's insistence upon discounting while ignoring inflationary effects. *Id.* The policy concerns of *Penrod*, (i) achieving complete compensation, (ii) preventing speculation, and (iii) simplifying trial procedures, would be served better by adopting an approach that considered the effect of inflation on damage awards. *Id.*

Penrod has also been labeled a source of serious judicial error. Kane, *Inflation, tight money, and Penrod: the cost of judicial error*, Texas Trial Lawyers Forum, April-June, 1980, at 3-5. In *Penrod*, we stated that "if future inflation does cause higher wages, experience predictably demonstrates that higher interest rates on investments which have always accompanied inflation will also occur and this factor will mitigate the failure to include an inflationary surcharge in wage rate calculations." 510 F.2d at 236.

> The obvious flaw in this line of reasoning lies in the fact that while interest rates do rise in response to accelerating inflation, a higher interst rate only *reduces* the present value of a future loss, thus further penalizing the plaintiff. The problem for the plaintiff is compounded when the series of future income payments cannot be proportionally increased for the same inflation that drove up the interest rate.

Kane, *supra*, at 3-4.

Spiraling inflation during the years since *Penrod* has indirectly led to much of the criticism of our 1975 opinion. Although consumer prices have fallen in the early months of 1982, which might signal the beginning of the end to "spiraling" inflation, this does not demonstrate that *Penrod* is not primarily its spectacular unfairness in periods of extremely high inflation. To the contrary, the danger of *Penrod* lies in its unwillingness to consider the effect of inflation on future wages at all. *Penrod* stands for the inflexible proposition or deflation at all, whether high or low or nonexistent, in predicting wage loss. At the same time, defendants are freely allowed to show the highest inflation-induced interest rates available on relatively safe investments. Unfortunately, any evidence of the fact that wages will likely increase to combat the eroding effects of inflation remains eclipsed by the Court-declared spectre of *speculation*.

What we seek, in response to criticism from both within and without the Circuit, is fairness with regard to the presentation of economic data by either side in the legal controversies that our federal courts face. The principles that we adopt to facilitate this goal must be flexible enough to remain workable in any economic climate. To this end, the remainder of this opinion will explore the alternatives and adopt those that meet the standards of economic flexibilitY and fairness to plaintiffs and defendants alike.

VII.

The Real Rate of Interest: A Possible Solution

In laymen's terms, the real rate of interest mirros the rate of interest that lenders would charge in an inflationless society. Interest rates are much higher because of the expectation of inflation and the uncertainty as to its extent. Thus, the real rate of interest becomes more difficult to calculate. For example,

> You lend [or invest] \$100 for . . . 30 years, at a rate of interst of 5 percent per year. The \$5 interest paid to you annually will rise or fall in purchasing power depending

> upon whether or not the general price level of various goods and services falls or rises. If the price level should increase during the first year by 3 percent, this means that of the 5 percent interest ($5 each year) about 3 percentage points (or $3 in real terms) is eroded away by the higher prices you must pay for goods and services. In effect, in real terms you have gotten only about 2 percent interest on your $100 loan [or investment].

A. Alchian & W. Allen, *University Economics* 193 (3d ed. 1972). Thus, the lender who correctly anticipated the rise in price level would have set a higher nominal interest rate on the loan, perhaps 8%, to allow 3% for the anticipated rise in prices and 5% for interest in terms of real purchasing power. *Id.* Accordingly, the nominal or advertised interst rate reflects both the basic or real rate of interest (which would exist absent any inflation anticipations) and an adjustment for the anticipated rise in price levels.

In theory, the real rate of interest represents a possible standard for determining the proper and fair discount rate to be applied to damages resulting from the loss of future income. For courts using this method, the rate of inflation, however calculated, is subtracted from the interest rate for some relatively risk-free investment, and the remainder is the real rate of interest, or discount rate, to be applied to the damages award. In practice, of course, the problem becomes more difficult. Even where parties to a controversy are able to establish both a projected inflation rate and an interest rate on some risk-free investment, using legally acceptable indexes nd tables, the fact remains that the goal of the exercise is to compensate the plaintiff for the income the worker would in all probability actually receive in future years. It is well-recognized that the average wage increases of many workers in the United States have not kept up consistently with inflation. This factor, then, must be applied to *increase* (e.g., from 2% to 4%) the discount rate so that the plaintiff, whose wages have not kept up and likely will not keep up with inflation, will not receive increases based upon inflation. On the other hand, if the average annual increase in wages in a particular profes-

sion has risen above the inflation rate, the plaintiff should not be limited to increases based upon the inflation rate. This factor highlights the major weakness of the "real rate of the interest" approach.

A simpler and more accurate approach to the problem is found where the plaintiff shows, by expert testimony or otherwise, all of the increases in wages he is likely to receive during his work-life expectancy. Likely increases in wages due to cost of living increases, merit or productivity increases, or promotion increases could all be separately established by the plaintiff in computing the total amount of lost wages. For most occupations, it is easy to find economic data of general wage increases, which include increases due to cost of living, merit, and productivity. The more difficult task of breaking down the data into the reasons for the increase, e.g. cost of living or merit increases, is not necessary in this simpler method. Then, the defendant has the opportunity to establish, by expert testimony or otherwise, the discount rate which reflects the rate of interest in a relatively safe investment, which is applied to the award to reduce it to present value. If this methodology is followed, the rate of inflation itself is only indirectly reflected (i) in the cost of living increases projected by the plaintiff (which may be more or less than the rate of inflation), and (ii) in the discount rate established by the defendant (which includes both the real rate of interest and the predicted effect of inflation). The result of such a calculation should not differ greatly from the result obtained through the *Feldman* approach. However, unlike the *Feldman* approach, this alternative method would more accurately represent the future wages lost by a particular plaintiff, in a particular occupation, in a particular geographic area.

VIII.

Economic Predictions and the Courts' Serbonian Bog

We agree with the critics that *Penrod* represents an idea whose time has passed. In an era of inflation, which has been with us for over forty years, it is quite clear that plaintiffs are

unfairly penalized by their absolute inability to present evidence of a historical fact—inflation. The likely effect of inflationary trends upon future wages is forbidden even though *Penrod* allows evidence from defendants regarding the applicable discount rate which has been increased by the very inflation so roundly excluded.

However, we are less than satisfied with the so-called Alaska Rule, which by assuming that the discount rate and the inflation rate are virtually identical, unncecessarily penalizes defendants because, as noted above in our discussion of the real estate of interest, interest rates on relatively safe investments will typically ride several percentage points above the rate of inflation. In addition, tied as it is to changes in the Consumer Price Index (CPI), the result would unfairly award the plaintiff the difference between the changes in the CPI and the actual or average increase in wages.

We are much impressed with, but certainly not willing to embrace uncritically, *Feldman's* approval of an inflation-adjusted discount rate in the neighborhood of 1.5%. 524 F.2d at 387-88. This view represents a compromise between the Alaska rule's penalizing of defendants and *Penrod's* penalizing of plaintiffs. However, fixing the inflation-adjusted discount rate at 1.5%, or even 2% or 3%, would subject this Court to criticisms not unlike those aimed at *Penrod* and even the Alaska rule. In the dynamic and ever-changing world of finance and economics, we as judges cannot rule out that the interest rate on risk-free investments might equal the inflation rate during a certain period such that the Alaska Rule is vindicated. Indeed, the logic behind the Alaska Rule is that in an economy of ups and downs, "it will all come out in the wash"—the interest rate and the inflation rate being, on the average, roughly equivalent. However, any standard which is inflexible in a dynamic economy will likely be unable to cope with the problem of preventing windfalls either to plaintiff or defendant. Although a perfect method may never be found, we must attempt to create standards that are fair to both sides of the controversy, with the trier of fact being allowed to receive and act upon

credible evidence of othe economic facts bearing, pro and con, on the competing theories.

The methodological basis of *Feldman* must be clearly understood as our analysis proceeds. Quite simply, and perhaps even simplistically, *Feldman* is a backward-looking, past-performance approach:

(1) It begins by considering the effective annual interest rate payable on a certain relatively risk-free investment each year during a particular past period of years, for example, 1940-1980. For each of those years during the period chosen, the average annual percentage change in the Consumer Price Index (CPI) (*see* note 25, *supra*) is determined using historical data.

(2) Subtracting the average annual percental change in the CPI for each year from the effective annual interest on the investment for that same year yields the actual or "real" rate of interest that an investor would gain during that year in terms of the buying power of the dollars invested. Because a single year in the past several decades might be unreliable, all of the real rates of interest are averaged. The result of such an analysis, for almost any relatively risk-free investment during any 10 or 15 year period in the past several decades, will be approximately 1-3%.

(3) This inflation-adjusted discount rate, the result of subtracting changes in the CPI from safe investment interest rates, is then *projected* over the plaintiff's expected work-life by applying the inflation-adjusted discount rate to each year's estimated salary to reduce the future annual salaries to their present value. The discount factor applied to each year would be different because the present value of a dollar received in the future, e.g., ten or twenty years from trial-date, is much less than the present value of a dollar received on the date of trial. Indeed, one dollar received even one year from now is worth less than one dollar today.

(4) If wages will increase due to promotion, merit, or peoductivity, then instead of using the plaintiff's current

wages as the amount to be discounted to present value for each future year of expected work-life, each future year's wage is computed by finding wat a person in the promoted position would likely be earning in the respective year. All the years are then added together to reach the lump-sum award. This computation is not limited to the single promotion or merit increase that the plaintiff would have received during the year of his injury, but may involve several increases during the plaintiff's work-life expectancy. For example, if the plaintiff is a stock-boy with a 30-year work-life expectancy, and he likely would be promoted in 10 years to stock manager, and in 10 more years to store manager, which is the highest position he would predictably attain, then the trier of fact would compute the trial-date salary of stock manager and store manager. The stock-boy's salary for each of the first 10 years would be reduced to its present value, the stock manager's salary for each of the second 10 years would be reduced to its present value, and the store manager's salary for each of the third 10 years would be reduced to its present value. All these results are added to find the lump sum award.

In light of our discussion, *supra*, of the theory of the "real rate of interest," several critical remarks are appropriate. First, the purpose of an inflation-adjusted discount rate, which simply means that the discount rate (proposed on the basis of safe investment) should be *reduced* by the rate of inflation eroding the profit on such an investment, is fully to compensate the plaintiff such that if the lump-sum award given in court is invested, the plaintiff will be able to receive, as nearly as possible, the amount of assumed income that would have been received each year in the future if no injury had occurred.

However, the *Feldman* approach assumes that the plaintiff's past and future income would increase, as it has, roughly, in the past forty years, along with the CPI. The difficulty with this assumption is that annual wage increases may not keep up with inflation as reflected in the CPI, and, to the contrary, such increases in average earnings in some occupations might be much greater than inflation. Second, the American economy

may change radically in the next several years. As evidence becomes available that the next 20 or 30 years, then the *Feldman* approach is less helpful. Nevertheless, despite these criticisms, the *Feldman* approach represents a fair and flexible alternative that is clearly superior, and more economically sound, than either *Penrod* or the Alaska Rule.

Lest we lose sight of the forest of practice in these trees of theory, our analysis must move to a practical example.

IX.

A Helpful Hypothetical

"The war against inflation is a grim affair." Justice Douglas, *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144 at 158, 64 S.Ct. 474 at 482, 88 L.Ed. 635.

We may now consider two hypothetical situations illustrating that the process of computing likely wage increases, due to the effects of inflation and other factors, need not depend upon suspect speculation, the use of strange formulae, or intricate expert prognoses.

First, assume that a plaintiff is totally and permanently disabled and that after allowable deductions for income taxes, social security taxes, and union dues, and after adding various fringe benefits, where applicable, his/her loss of future earnings would be $10,000 per year for the balance of a work-life expectancy of 18 years, or a gross expectancy of $180,000. This plaintiff could purchase for approximately $78,000 enough United States Bonds to allow him or her to receive $10,000 each year from 1981 through 1998. Government Bonds are relatively risk-free invesments for an unsophisticated investor, because they typically require no reinvesting of funds over the next 18 years provided that no bonds are redeemed in advance of their maturity. This rough computation takes into account the interest that would be paid on the bonds, as well as the estimated income taxes on the interest received each year by the plaintiff, such that the plaintiff receives $10,000 spendable dollars each year. The economic fact that the plaintiff needs

only $78,000 to ensure that he or she will receive the assumed $180,000 in lost future wages is, of course, the legal justification for applying a discount rate. Significantly, this model assumes that the plaintiff would have received no wage increases, for whatever reason, in the next 18 years.

Second, assume a projected 5.12% annual increase in wages based upon past increases in the national average weekly wage, such that this plaintiff's salary increases from $10,000 in the first year, to $10,512 in the second year, to $11,050 in the third year, and so on until an annual salary of $23,314 is reached in 1998. The total amount earned by the plaintiff, assuming this increase in wages, would be $284,494. Of course, this estimate assumes that the plaintiff would experience wage increases, either on the basis of performance and experience or due to cost of living increases, at the national average (5.12%) of workers over the past several decades. Using the same calculations as above for a risk-free U.S. Bond portfolio, it can be estimated that approximately $120,000 would produce the $284,000 in wages lost with the 5.12% per year increase considered.

In summary, in the first hypothetical situation above, the plaintiff would introduce evidence that his/her annual take-home pay is $10,000 and that he/she would probably have worked for 18 more years. The defendant would simply prove that it would take about $78,000, safely invested, to assure that projected loss of income. In the second hypothetical situation, which is much more realistic in terms of our national economy, the plaintiff not only shows present income and work-life expectancy, but also presents evidence that his/her salary will likely increase, just like average wages have increased in the past, at the annual rate of 5.12% due to inflationary (cost of living increases) and non-inflationary (merit, productivity, etc.) factors. The defendant in its response again can establish that approximately $120,000, safely invested, would allow the plaintiff to spend each year an amount roughly equivalent to his/her projected annual salary.

Comparing the above two hypothetical situations with the approach in other jurisdictions, it is clear that under the Alaska

Rule, the plaintiff would receive a lump sum of $180,000 in both situations, because inflation (and cost of living increases) are presumed equal to the discount rate (i.e., safe investments). No discount rate is applied, an obvious windfall to the plaintiff who could, using safe investments, produce $414,000 over the next 18 years. Under *Penrod*, the first situation was common: lump-sum awards were discounted while no evidence of cost of living increases, which account for most of the 5.12% figure in the second situation, was permitted. Under *Feldman's* inflation-adjusted discount rate (real rate of interest) approach, past average wage increases are not considered, but past annual inflation rates are subtracted from past annual interest rates on safe investments to determine the discount rate. The plaintiff in this situation would receive $156,725.26.

[2, 3] Given the likely availability of relatively risk-free investments to the unsophisticated investor, and given a dunamic economy, it is not our purpose to establish a single methodology. Nor are we attempting to decide today what precie types of economic data should be found competent by the courts as parties attempt to prove up, or discount, probable future lost wages. We do hold, however, that *Penrod's* prohibition of any consideration of inflationary factors is unfair to plaintiffs and is therefore overruled. The basis for that holding is not that "inflation is here to stay," for we are not capable of making such an economic prediction. The critical error of *Penrod* was its failure to recognize the *effects* of inflation on wages in this country over the past several decades, as they would bear upon the actual dollar amount of money a person would receive over a future period of time. Given that wage-earners have typically received cost of living wage increases on the basis of inflation, plaintiffs should be permitted to establish by factual economic and labor data, and expert testimony, that their income would probably continue to increase in response to inflation in future years if they continued to work. Likewise, using economic and labor data and expert testimony, the defendant should be permitted to rebut such evidence.

Significantly, economic and labor data regarding increases in wages and inflation are not always complex and mysterious so as to require highly skilled economists to interpret them. On the contrary, most of the tables prepared by the Department of Labor, Bureau of Labor Statistics, are readily availble and easy to understand, and, more importantly, are considered accurate for most purposes. The availability of such statistics is import because an injured plaintiff (or his beneficiaries) is never to recover damages simply because inflation is likely to erode an award, but only lost wages, and insofar as wages will likely increase in the future, evidence of inflation is permitted to show what future wages wille be.

[4, 5] Various methods are available that allow the plaintiff to ensure consideration of the effects of future inflation on lost wages. We have already discussed the inflation-adjusted discount rate (or real rate of interest) used in *Feldman*. Although we find such an approach acceptable, and certainly superior to the *Penrod* or Alaska Rule approach, we must emphasize that defendants must be permitted to demonstrate the likelihood that the plaintiff's wages have not kept up, nor will they likely keep up, with inflation. Given this additional factor, the *Feldman* approach becomes less simple. Another approach, illustrated in our hypothetical above, allows the plaintiff to present evidence of average annual national, local, or occupational wage increases over the past sever decades, and thereby to present an average annual increase in wages due to merit, productivity, promotion, or cost of living increases. This may, in some cases, be a simpler approach. Other approaches will likewise be found acceptable, insofar as they permit the plaintiff to show likely wage increases, due to inflation or any other reason, and at the same time allow defendants to present evidence of relatively risk-free investments in the economy that would allow a plaintiff to replace lost income in future years.

X.

Jury Instructions

[6, 7] Where the case is tried to a jury, instructions are required. Without attempting to writ or construct a suggested charge, we point out that the instructions may take several different forms depending on the permissible methodology used.

If the *Feldman* approach is used with its inflation-adjusted discount rate (real rate of interest), the jury must make three separate determinations. First, they must consider and determine all of the future income losses on the basis of the plaintiff's present income on the basis of the plaintiff's present income and, in addition, any increases that the plaintiff would likely have received due to merit, productivity, or promotion, but *not* inflation. In determining future merit raises or promotions, it should be made clear to the jury that any portion of such increases due to inflation or cost of living raises should not be added into the aggregate sum. Second, the jury must determine, on the basis of the evidence presented to them, the likely increase in the CPI (the acceptable inflation indicator under *Feldman*). Third, the rate of interest available on some safe investment must be determined. On the basis of the second and third findings, the trial judge will then be in a position to determine the inflation-adjusted discount rate (real rate of interest) by subtracting the projected change in the CPI from the investment interest rate. The result is the discount rate to be applied to reduce the lost future income to its present value to determine the amount of the award.

[8-10] On the other hand, if the plaintiff shows *all* likely wage increases due to inflation and other factors (as in the hypothetical above where a 5.12% annual increase was used), which allows the defendant to show what amount of money is necessary, using a relatively risk-free investment, to ensure that the plaintiff will receive those projected future wages losses, the jury should be instructed to answer two basic questions. First, the amound of lost future earnings must be deter-

mined and must include all likely increases due to inflationary factors such as cost of living increases as well as non-inflationary factors such as merit or promotion raises. It must be made clear that the jury is to project only those increases that the plaintiff would actually have received, with reasonable likelihood. All projected future lost earnings are then aggregated by the jury without considering any discount to present value. Second, the jury must determine the likely earning capacity of an invested award. The answer to this question may take two forms: (1) Where the parties have introduced evidence of the probable availability of particular interest rates, or rates of return, on reasonably safe investments, the jury should find and fix the particular rate of interest available to the plaintiff. This finding would then serve as the discount rate to be applied by the judge to the aggregated lost earnings to reduce that sum to its present value. (2) If the parties wish to show, instead of an interest rate, an amount of dollars that, if invested in government bonds or some other safe investment, would fully compensate the plaintiff for all projected lost future wages, then the jury should consider that evidence and find a particular amount of money that they believe could produce the aggregate lost earnings, which they previously determined. It would then be possible for the judge to determine the amount to be awarded by either (1) applying the discount rate found by the jury to the aggregate lost earnings to reduce that amount to its present value, or (2) adopting the jury's finding as to the amount of money which, if invested, would produce in future years the plaintiff's projected lost earnings.

[11] In the jury instructions, and, of course, in the final arrangements, it should be clear that the purpose of the award for future lost wages is not to protect the plaintiff from future inflation. The goal is simply to replace for future wages actually lost. If the plaintiff's income in future years will be greater due to likely cost of living increases, then the plaintiff is entitled to those increases. But if the plaintiff's wages are likely to increase at a rate less than inflation (cost of living) the plaintiffs is only entitled to such wage increases and not an increase

based on the rate of inflation. Jurors are thus entitled to consider and determine the actual likely wages that the plaintiff would have received but for the disabling event.

XI.

The Search for Federal Uniformity

The Third Circuit recently held, in *Pfeifer* v. *Jones & Laughlin Steel Corp.*, 678 F.2d 453, 461 (3d Cir. 1982) that the "The total offset method" of measuring damages for loss of future earnings, in which the discount factor used to reduce future earnings to present value is presumed offset by future inflation, applies in negligence actions against a vessel owner under the L.H.W.C.A., 33 U.S.C. §§ 901 *et seq*. As discussed above, this is an adoption of the Alaska Rule, although the Court did not describe it as such. Recognizing that inflation has become an established phenomenon in our economy that must be considered in awarding damages for future lost earnings, the court stated that a uniform federal rule must be established and applied in maritime cases. 678 F.2d at 457. Toward this end, the Alaska Rule was embraced because it contributes to judicial efficiency and eliminates the necessity for economic speculation, thereby introducing greater certainty as well as facilitating settlement of personal injury claims.

The Seventh Circuit recently chimed in, holding that the trier of fact co9uld take inflation into account in computing damage awards. In *O'Shea* v. *Riverway Towing Co.*, 677 F.2d 1194, at 1200 (7th Cir. 1982), Professor, now Judge Posner, citing with disapproval the panel opinion in *Culver*, declared that "it is illogical and indefensible to build inflation into the discount rate yet ignore it in calculating the lost future wages that are to be discounted. That results in systematic undercompensation." We can but agree.

[12] We share the concern for unformity in the federal law of damages in maritime cases. Although we find it imprudent to adopt the Alaska Rule, because it is fraught with the same inflexibility that *Penrod* exhibited, we approve the use of any

of the methods outlined for calculating future wage losses that results in fairness to plaintiffs and defendants. We see no reason to make the economic judgment, as did the Third Circuit in *Pfeifer*, that the rate of future inflation will be equivalent to future interest rates.

One important aspect of the problem of uniformity in federal maritime law is illustrated in *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981). It was held that (i) federal courts do not have exclusive jurisdiction over personal injury and indemnity cases under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 *et seq.*, and (ii) the issue of whether the jury should be instructed that personal injury damages are not subject to federal income taxation required remand to the state courts for determination under Louisiana law—agreed to be controlling in the case. 453 U.S. at 483-488, 101 S.Ct. at 2877-2880, 69 L.Ed.2d at 795-98. On remand, the Texas Court of Civil Appeals held that Louisiana law does not require a jury instruction that damage awards are not subject to income taxation. 628 S.W.2d 171, 174 (Tex. Civ. App.—Houston [14th] 1982). Moreover, the Texas court found that the Supreme Court's holding in *Liepelt, supra*, that a defendnat in a FELA death case is entitled to an instruction that damage awards are not subject to federal income taxation, did not displace the Louisiana rule in this OCSLA case.

Although these precise issues are not presented in this case, we are faced with the need for uniform federal law with regard to the admissibility of evidence on inflation in the determination of future damage awards. Because the opinions in *Gulf Offshore, supra*, demonstrate (i) that state courts have concurrent jurisdiction over nearly all maritime *in personam* suits, (ii) that various state standards with regard to damages are possible, then to the extent it will be favorably received, we view our opinion as minimizing if not eliminating one more source of friction between federal and state courts. Permitting the introduction of inflationary factors in projecting future wage losses brings this Circuit, we believe, more in line with prevailing view throughout the nation.

XII.

Summary and Conclusions

Our goal in this opinion is to formulate a simple principle, without being simplistic, that will permit the determination of damages caused by future loss of wages such that neither the plaintiff nor the defendant is penalized (or given a windfall) by economic theory or reality. To begin with, we reject the suggestion that the discount rate, based upon safe investments, is roughly equal to the wage increases that an individual ill receive. On any weekday in trial courts throughout the nation, a discount rate can be established using voernment securities or savings certificates, as examples of safe investments, for any amount of damages. However, the average wage increases for a particular occupation and, if appropriate, in a particular area of the country. Thus it would be unfair and unreasonable to rule as a legal matter in advance that the discount rate equals wage increases, or, likewise, to say as a legal matter that the wage increases of a particular plaintiff are equal to the rise in the consumer price index or the average economy-wide wage increases for all workers. Our first conclusion, therefore, is that parties should be allowed, in future earnings damages cases, to present evidence not only of the interest rate available on safe investments, but also the likely wage increases that would have been obtained by the particular plaintiff in his occupastion, whether these likely increases are due to cost of living, promotions, merit raises or productivity. Significantly, this is only part of the solution, because the more difficult question is how the likely wage increases are to be established or determined.

[13] **We have discussed several acceptable methods that are useful in the consideration of the likely effect of inflation on future wages in a case involving total and permanent disability. Two may be summarized. In the first, the present-day value of the earnings that the plaintiff would likely have received may be calculated in three steps:**

(1) Using the average annual rate of increase in the plaintiff's own salary in the years prior to the incapacitating event,

or in the alternative, using the average wage increase of workers nationally or in the decedent's occupation and geographic area over, for example, the ten years prior to his injury, the parties can project the annual earnings for the remainder of the plaintiff's estimated income-generating years. A lump sum of likely lifetime earnings is the result of these calculations. This total would include wage increases due to cost of living increases, merit, or productivity, as they are received by the average worker or, if the plaintiff's own past wages are used, by the plaintiff.

(2) The above lifetime earnings are converted to an average annual income by dividing the lump sum by the number of income-generating years.

(3) The present value of the plaintiff's average annual income is then computed by determining how much money must be invested at the present time to yield each year the average income for the remaining income-generating years. This calculation can take the form of applying a traditional discount rate, and it will be based upon relatively safe investments such as Treasury Bills or bonds, or similar instruments.

A second approach is the *Feldman* inflation-adjusted discount rate, which is based upon the real rate of interest. The steps followed in *Feldman* to ensure that the plaintiff was compensated for future wage losses due to inflation are as follows:

(1) Using historical economical data, the court establishes the effective annual interest rate payable on some safe investment for each year during a particular period of years, *e.g.* 1940-1980.

(2) For each of the years during that period, the average annual percentage change in the CPI is established.

(3) The average annual percentage change in the CPI for each year is subtracted from the effective annual interest rate on the chosen investment for that same year, thus establishing a series of real rates of interest, or the inflation-adjusted discount rates.

(4) All of the real rates of interest are averaged, and the resulting percentage rate represents the inflation-adjusted discount rate to be applied to the plaintiff's lump-sum award.

(5) In computing the lump-sum total, the plaintiff is permitted to show all likely future wage increases due to promotions, merit or productivity raises, or any other *non-inflationary* factor. If promotions are likely, then the annual salary of a worker *presently in that promoted position* should be used to compute the plaintiff's projected income for the years he/she will be in the promoted position. If the plaintiff can show no likely promotions or raises, then in the number of years remaining in his/her work-life expectancy, the plaintiff's present income is assumed as the projected salary for each year.

(6) The inflation-adjusted discount rate is then applied to reduce each projected annual salary to its present value, and the total of these future discounted annual salaries is the amount to be awarded.

The above methodologies are only suggested approaches, and not strait-jackets, for courts to use in determining future earnings. The methdologies do illustrate, however, the issues upon which evidence may be presented in this Circuit now that *Penrod* is overruled. In response to the plaintiff's evidence on inflation, defendants will continue to be permitted to introduce evidence of the interest rate available on risk-free investments, and plaintiffs will continue to be able to rebut that evidence. Plaintiffs will now also be able to introduce evidence, not only on inflation, but more importantly on the likely wage increases in the decedent's or injured party's occupation, basing their calculation on past average wage increases and future inflation, with all parties and trial courts keeping in mind that wage increases are influenced by, but not necessarily dependent upon or identical to, inflation.

Postlude

Having devoted substantial consideration to the economic problems inherent in properly taking inflation into account, we

now emphasize that in most cases the apparent difficulties should not arise. As complicated as this subject appears to be, it is a place for vigorous pre-trial discussion and handling between the trial judge and the attorneys. In the great majority of cases, we believe, the parties can and will be able to stipulate to the methodology, discount rate, inflation rate, the admissibility of economic data, tables, etc. and other technical aspects, as well as to any particular issues of fact underlying the calculations. In a jury trial, this should include, to the maximum extent possible, agreement as to specific issues, the form and manner of their submission, appropriate jury instructions and interrogatories and any objections thereto.

And, to the extent complete stipulation is not reasonably possible the formalized pre-trial effort should assure that the areas of dispute are considerably reduced and certainly well defined.

If the trial court can bring the parties together in this fashion, economic technicalities should not trouble the jury and, we fervently hope, the issues, if any, for appellate review will be sharply presented on an adequate evidentiary record preserving identifiably distinct legal problems.

To eliminate doubts we also declare that this decision is immediately effective to control cases (i) now being tried, (ii) tried hereafter and (iii) those heretofore tried and now on, or subject to, appeal in which the issue has been properly and adequately raised. And while not fundamentally a *Penrod* problem, the question whether to allow pre-judgment interest may well arise in some cases. In those instances where the substantive law permits a court to award pre-judgement interest, the court must discount the damage figure back to the date of the event, i.e. injury or death, and may award pre-judgment interest for the period between the event and judgment. *See Havis* v. *Petroleum Helicopters*, 664 F.2d 54 (5th Cir. 1981). *See generally* Linke, *Assessing the Pecuniary Value of Human Capital, supra;* Annot., *Award of Prejudgment Interest in Admiralty Suits*, 34 A.L.R. Fed. 126, 228-38 (1977).

On the basis of the above analysis, we overrule *Penrod*, and remand the present controversy to the District Court on the issue of damages. The panel opinion is adopted in all other respects.

REVERSED AND REMANDED.

JAMES C. HILL, Circuit Judge, with whom R. LANIER ANDERSON, III, Circuit Judge, joins, concurring in part and dissenting in part:

"BUT, ON THE OTHER HAND . . . ."

Given the task of interpreting and applying the law, our court embarks upon a survey of economics. We took the case to reconsider and reevaluate the holding of this court in *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (en banc). I agree with my colleagues that *Penrod* is wrong, but I find it wrong because it is only half right.

In *Penrod* we correctly held that, in forecasting future earnings, the jurors should not be allowed to apply their opinions as to what effects future inflation would have on wages or other earnings. The lesson of *Penrod* is that no value ought to be based upon speculation and that the forecasts of lay jurors on the subject of inflation cannot be made anything better than speculation. We thus limit plaintiff's proof of lost wages to a projection of wages currently earned or capable of being earned paid in dollars of current value. We recognize that a defendant ought not be required to pay the full value of such an annuity in a present lump sum equal to the total of all wages yet to be earned. Payments for future earnings are to be discounted to their present value, and this is just and proper. However, we did not address the discount rate other than glibly to state, "the calculated gross future earnings must be reduced to present value by the use of *an appropriate interest rate prevailing at the time and place of trial.*" 510 F.2d at 237 (emphasis added).

Inasmuch as the plaintiffs must not, in my opinion (and as *Penrod* held), be permitted to seek an increased award because

of anticipated inflation, the defendant should not be entitled, in discounting future payments, to use an interest rate insofar as it is based upon anticipated inflation. Predictions of inflation or deflation ought to be taken out of both sides of the equation. In Part VII of the majority opinion, "The Real Rate of Interest: A Possible Solution," we have the solution I prefer. It was expressed by Judge Blumenfield in *Feldman* v. *Allegheny Airlines, Inc.*, 524 F.2d 384 (2d Cir. 1975). It requires and permits the least speculation and provides the nearest approach to fairness to all parties of all the methods suggested for dealing with issues which are a magnet for speculation and are invitations to unfairness—to plaintiff, defendant, judge, and jury.

The majority does not disapprove the Feldman approach; however, it prefers an alternative measn of remedying the imbalance *Penrod* creates. It endorses allowing the jury to consider the effect of inflation in the calculation of damages, the plaintiff's side of the equation. For the reasons expressed quite well by Judge Johnson, in dissent, I believe that approach to be far too speculative.

I suggest that a careful perusal of the opinion for the majority is all that is needed for one to conclude that judges and jurors ought not embark upon—or be instructed to embark upon—the crystal-ball gazing necessary to economic forecasting. Were a trial judge to instruct a jury by verbatim recitation of parts I-IX of the majority opinion, the judge would have committed the error of a totally confusing instruction. Yet even properly instructed as Part X suggests might be done, the court would be indulging in the unrealistic assumption that the jurors would, in deliberation, go through the economic analysis of the first nine parts of the opinion. Further, we would assume that, having done so, the conclusions of the jurors would, somehow, be more nearly accurate than the prognostications of acknowledged economic experts have been over the past several decades, during which time the experts have often been in total disagreement, and, as Judge Johnson points out, often totally wrong!

I cannot fully agree with the conclusions of Judge Johnson's dissent, though, because it rejects the *Feldman* approach in favor of the Alaska Rule, which treats inflation and discount rates as offsetting each other totally and therefore canceling each other out. As the majority and Judge Johnson's dissent both recognize, the Alaska Rule results in an unjust enrichment to a plaintiff who receives a present undiscounted award for losses not to be realized for years to come; the defendant is wrongfully required to pay more than is due. In contrast, the *Feldman* approach is theoretically proper because it accounts for the value of the use of capital by applying the real rate of interest as the discount rate.

The dissent asserts that the discount rate under the *Feldman* rule ought to be established as a matter of law and contends that determining the real estate of return would involve too much guesswork. I envision the rate as the factual matter. I acknowledge that a full blown trial to ascertain the real discount rate might be fraught with much of the same confusing economic expert clashes of opinion that I find deplorable in the procedures envisioned by much of the majority opinion. However, realistically, I do not anticipate great trouble on this score. The "real discount rate" or "real interest rate" is a small figure when compared to rates of inflation or interest rates including inflationary factors. While there may be marked academic differences in its establishment, it seems to come out from all calculations within one or two percentage points. Thus, it may be 1.5% to some and 3% to others, but the total dollar impact upon the expected verdict in a given case is so relatively small that litigants will likely find it hardly worth the cost of the expert testimony necessary to disputatiousness. In the vast majority of cases, once the rule is established, the rate will be agreed upon and stipulated. In those cases, once the rule is established, the rate will be agreed upon and stipulated. In those case where agreement on an appropriate discount rate is not reached, experienced trial judges can be expected to help the parties. One might require, pretrial, a clear statement of the contentions of each so that the expenses

of the party prevailing on that issue, incurred in the proof of it, can be charged to any party found to have disputed groundlessly.

This is not the perfect solution, but I suggest it is the best. Interest rates are obviously not made up purely and simply by adding a constant and unchanging charge expected for the use of money to the amount to be charged in anticipation of inflation. The law of supply and demand no doubt plays a role. When massive government deficits require governmental institutions to enter upon the money market place for massive borrowing, the demand for limited capital funds will cause the real charge for the use of those funds to increase somewhat above the percentage that would be charged were the demand smaller. Thus, the "real interest rate" may move upwards or downwards over a period of years depending upon the supply of capital savings compared to the demand for borrowing. A discount at the current real interest rate might not represent the discount that would have occurred some years ago or that will be taking place some years hence. This bit of uncertainty may be tolerated, however, in the type of case we are here considering where some uncertainty (life expectancy, future health and earning capacity, etc.) is necessarily acceptable; we accept some uncertainty because there must be a way to approach justice in these cases. It is a rare case in which the parties do not stipulate to life expectancy and the expected duration of earning capacity. I anticipate that the same approach would be taken the establishment of a real rate of interest.

For these reasons, I concur in the judgment. I would pronounce our reaffirmance of the *Penrod* rule forbidding evidence of inflation or consideration of inflation by the jurors in predicting future earnings. I would disapprove of its insofar as, in dicta or otherwise, it permits the discount of future earnings at an interest rate "prevailing at the time and place of trial"—an interest rate including a hedge against inflation.

Preferring the second choice of both the majority and Judge Johnson, I would simply require district courts to apply the *Feldman* rule.

CHARLES CLARK, Circuit Judge, with whom RONEY and GEE, Circuit Judges, join, dissenting:

Seven years ago *Johnson* v. *Penrod Drilling Company* told litigants, lawyers and trial judges in this circuit that simplicity and efficiency of trial procedures and instructions were the path to justice in jury trials of future damage cases. This court en banc said predictions as to inflation rates and income tax effects were too contingent, too variable, and too speculative for jury consideration. In *Liepelt*, the Supreme Court required that juries be told to consider the effect of present income tax laws on future damages. Today's decision goes much further. It puts back in these trials the pre-1975 debates which had developed between economics experts and the prolix instructions on the use of complex formulae they generated. Because these trappings only serve to suppress the common sense assessment of damages by lay jurors, I respectfully dissent.

Penrod held that to attain simplicity and efficiency future earnings were to be reduced to present value by the use of the "interest rate prevailing at the time and place of trial." The majority sees this as deducting an inflationary increment that unfairly penalizes the damaged party. It would eliminate the perceived inequity by adding a balancing inflationary factor to future damages. Judge Johnson's dissent, on the other hand, would solve this problem by eliminating the discount. The majority's remedy compounds the speculative and complicates trial procedures. Its professed goal of formulating "a simple principle" is lost in a fog of words and figures. The remedy of Judge Johnson's dissent, though clear and uncluttered, always deprives the damaging party of more than the cost of the wrong. I respectfully assert *Penrod* presents no "inequity" or "problem" and remains a better solution than either.

What is overlooked or misunderstood in casting *Penrod* aside is that its use of the prevailing interest rate at the time

and place of trial to discount present awards of future dollars works in terms of marketplace realities. No one wins. No one loses. No one speculates. Under *Penrod* the plaintiff's future losses are based on fact, not speculation. The prevailing interest rate is not only simple to prove, but, because it is real and current, it is also available to the plaintiff for the investment of the funds he has received. The majority's speculation that it is not available is just that—speculation. Whatever factors (inflation, money supply and the like) that make the rate high or low for discount purposes are available for investment purposes. If it is not so, then the rate is not the true prevailing rate.

Even the recent history of this young nation reveals that economic cycles come and go—oft times with dramatic, unpredicted swiftness. Most economic alchemists claim they can refine a "real" or "true" rate of interest from the base figures. The trouble is they don't agree on its amount. *Penrod* did not require a search for this rare value because it would lead into a maze of expert opinion and instruction as confounding as the search the majority requires.

It is said that death and taxes are the only things certain in this world. They are bound to soon be joined by confusing jury instructions because, as the law develops, more and more judges are able to convince themselves that more and more words can clafiry the obscure and simplify the complex. As Judge Johnson's dissent aptly demonstrates, the majority opinion is autogenous perfect, but I insist it is the fairest workable way to justice in these cases.

Trial courts have taken *Penrod* further than it was intended to go by denying plaintiffs the right to prove and recover predictable future wage increases for merit, productivity or longevity. I agree this should be corrected in this case. I respetfully dissent from the remainder of today's mandate.

GEE, Circuit Judge, dissenting:

I join in Chief Judge Clark's dissenting opinion, adding only that the majority approach throws open the gates of fairyland,

where in future there will be fought mighty battles in the air between experts opining learnedly under oath upon the intrinsically unknowable. Persons unable—as Judge Johnson's opinion illustrates—to forecast reliably what the inflation (or deflation) rate will be one year ahead will swear to what it will be in forty. It seems especially ironic that we decide future rates of inflation sufficiently susceptible of knowledge to indulge sworn speculation about them today at the very time when it has become possible to believe that shortly they may become insignificant.

TJOFLAT, Circuit Judge, dissenting:

Appellants ask this court to abrogate the rule of *Starnes & Johnson* v. *Penrod Drilling Company*, 510 F.2d 234, 241 (5th Cir. 1975) (en banc) that "the influence on future damages of possible inflation or deflation is too speculative a matter for judicial determination." Because appellants, in their case in chief, failed to proffer competent, admissible evidence of the impact of inflation on lost, future wages and because a jury cannot consider this issue without such evidence, appellants cannot benefit from a holding of this court overturning the decision in *Penrod*. Appellants are not entitled to the new trial on damages the majority prescribes, and therefore I must respectfully dissent.

I.

In *Penrod Drilling Company*, this court—in the face of competent expert testimony from two economists on the issue of inflation—adopted a rule that excluded any evidence or jury instructions concerning the impact of inflation on damage awards because "we still cannot so surely discern the shadow of inflation as a coming event to warrant requiring its inclusion in a present rule for calculating future damages." *Penrod*, *supra*, 510 F.2d at 236. Thus, regardless of the qualifications of an expert or the basis for his testimony, we proscribed any effort to factor in the impact of inflation on recoveries for future losses. As Judge Brown points out for the majority, the "Penrod rule" as subsequently interpreted by this circuit has

amounted to a "flat prohibit[ion] [of] any consideration of inflation." Majority Opinion, at 290.

In this case, the appellants sought, and were refused, a jury instruction concerning the impact of inflation on damages awards. Record, vol. 4, at 865, 867-68. On appeal, they urge us to change the *Penrod* rule barring such an instruction and to hold that competent evidence of inflation may be considered by a fact-finder in calculating lost earnings. However, appellants established no foundation whatsoever in the record for such an instruction. Indeed, they did not proffer or even attempt to proffer a scintilla of evidence in their case in chief concerning inflation; for strategic reasons they did not want the jury to hear such evidence. They now have the audacity to claim in their brief to the court en banc that the trial judge "would not permit any proof, or even a bill or a proffer of proof (sic) concerning inflation or deflation, or the rapidly decreasing value of a dollar. He would not permit it for the record, for proof on this appeal, or for any other purpose." Plaintiffs-Appellants Post-Submission Brief at 5. The record reveals that this claim is false. The *Penrod* issue is therefore not before us.

II.

The district court held a pretrial conference in this case and entered a comprehensive pretrial order which set forth, among other things, contested issues of fact and law. Nowhere in that order is there any indication that the plaintiffs wanted the jury to consider inflation in calculating damages. Record, vol. 2, at 333-49.

Although the plaintiffs listed "Dr. Seymour Goodman," an economist, as a potential witness, they did not indicate that his testimony would bear on inflation. *Id.* at 346. In fact, Dr. Goodman was not called, and plaintiffs called not witness to testify on inflation. Plaintiffs made no proffer of any kind on inflation during their case in chief. Their claim that the trial judge would not permit them to do so is therefore unfounded. This is made clear by a colloquy that occurred between the court and counsel during the plaintiffs' cross-examination of a

defense expert witness, Hattier. It was during the cross-examination of Hattier that plaintiffs first attempted to inject inflation into the case. Record, vol. 7, at 745-48.

By plaintiffs' admission, their choice not to call their expert, Goodman, during their case in chief was purely tactical: "The reason that the Culvers did not call their 'expert' actuary was to avoid putting the high discount rate before the jury . . . ." Plaintiffs-Appellants Post-Submission Brief at 5. Thus, plaintiffs deliverately did not make a proffer concerning inflation.

The defense called Hattier as a bond expert for the sole and narrow purpose of establishing an appropriate discount rate in accordance with *Chesapeake & Ohio Railway* v. *Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916). When counsel for plaintiffs attempted to ask Hattier on cross-examination about "inflationary trends" and the value of the principal of a thirty-year government bond at maturity, the court sustained a general objection from defendants. Record, vol. 7, at 742.

Shortly thereafter, plaintiffs' counsel approached the bench and sought to proffer the testimony he thought Hattier could give concerning inflation, a subject upon which he did not testify on direct nor for which he had been qualified by counsel. The court properly resisted plaintiffs' attempt to make defendants' expert its own:

> Make whatever proffer you want. Let me tell you this. In the first place, you just make your proffer, make your statement here, but let met tell you this is excludable because he didn't go into this on his direct examination. It is improper cross-examination. You rested your case and you can't bring this witness back as part of your ease in chief. You offered no evidence on that in the case in chief.

Record, vol. 7, at 745. Plaintiffs' counsel then stated that he wished to ask Hattier about inflationary trends, the impact of inflation on bonds and other investments, etc. Record, vol. 7, at 746-48. Counsel offered no proof that Hattier would so testify, or, more fundamentally, that he was qualified to give such expert opinion testimony under the Federal Rules of Evidence. *See* Fed. R. Evid. 702.

At the conclusion of this brief proffer, the trial judge made it clear that such evidence would not be admitted for two, independent reasons: "you can't use the cross-examination of this witness as part of your case in chief," Record, vol. 7, at 747, *and* "I will not permit you to introduce any evidence before the jury relative to inflation in view of the present law that I am bound by which is the *Penrod* case." Record, vol. 7, at 748. It was "[f]or those two reasons [that] the attempt to elicit that testimony in the presence of the jury is denied." Record, vol. 7, at 747.

The trial then ended without further testimony and without any attempt by plaintiffs to reopen their case to introduce inflation testimony. The issue of lost future earnings was thus presented to the jury on evidence concerning the life and work expectancies of plaintiffs' decedent, and the hourly wage for a superintendent of pushers of an anchor pulling crews, the decedent's job at the time of his death. There was no evidence concerning the effect of inflation on future earnings. A charge conference preceded counsel's closing arguments to the jury. The record is unclear as to whether plaintiffs sought a jury instruction allowing the jury to take inflation into account in their damages award, but I assume one was requested because the court told counsel that it could not argue inflation to the jury. Record, vol. 8, at 764-65.

The net effect of plaintiffs' trial strategy was that a party which made a tactical decision not to offer evidence on inflation nonetheless sought an inflation instruction asking the jury, I suppose, to call upon its genius, general knowledge and previous information to arrive at the inflation component of its damages award. The district court properly refused such an instruction. The refusal of the court to give it is the only error the appellants now present to this en banc court.

III.

Whatever may be said about *Penrod* and the merits of the rule concerning inflation, one thing is clear: juries cannot be left in the wilderness to speculate about the future effects of

inflation on lost wages where the record contains no evidence on that subject. To reach this conclusion we need not decide whether in a case that presents competent, probative evidence of inflation, *Penrod* shoud be overruled, thus permitting the jury to consider such evidence in calculating prospective wage losses.

The majority attempts to excuse the failure of appellants to preserve the *Penrod* issue by stating: "Given this flat prohibition *against introducing testimony* (or making argument) as to future inflationary trends on the basis of *Penrod*, it makes no sense to argue that Culver may not raise this issue on appeal simply because he (sic) did not proffer an expert on inflation." Majority Opinion, at 285. (Emphasis added.) This implicitly acknowledges the appellants' failure to take the necessary steps to preserve an issue for appeal, *see* Fed. R. Civ. P. 46, but asserts that because the trial court prevented Culver from making a record we must overlook this failure.

The majority's statement that the trial court prevented plaintiffs from "introducing testimony" is simply incorrect. As I have pointed out, the plaintiffs, for purely tactical reasons, rested their case without even attempting to introduce inflation evidence. They made no attempt to preserve the *Penrod* issue for appeal. All they preserved for the Court of Appeals is the right to a jury instruction on the impact of inflation on future wages in a case where they deliberately refrained from introducing evidence on inflation. Such an instruction without any record evidence regarding inflation would invite the lawyers in closing argument to call upon the jury simply to invent an inflation figure out of thin air. I cannot countenance this result.

What the majority forgets—in its haste to reach the *Penrod* issue and change our rule concerning inflation—is the responsibility of this court to do justice for the litigants in the case before it. No one needs to be reminded that "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"; U.S.

Const. art. III, § 2. The requirement of a "case or controversy" prior to the exercise of the judicial power is designed precisely to prevent what has occurred here: abstract judicial law-making in the absence of facts and parties with a dispute requiring its exercise. Here, the *Penrod* issue is not properly before us, and to raise it without a proper foundation is both to run roughshod over the constitutional restraints on our power and to require the defendants to submit to the retrial of an issue properly laid to rest in the district court.

The district court acted well within its discretion in preventing the plaintiffs from making a defense expert their own witness on cross-examination, *see* Fed. R. Evid. 611(b), and it correctly denied a requested jury instruction that was plainly erroneous.

I would affirm the judgment of the district court.

FRANK M. JOHNSON, JR., Circuit Judge, dissenting:

I dissent. I find unacceptable the majority's proposals for incorporating the effects of future inflation into damage awards. Those proposals are founded upon a delusive belief in the ability of any court, jury, or expert to avoid utter spdculation in attempting to predict future rates of inflation. Today's holding will inflict upon the district courts burdens that are both complex and time consuming. Thowe burdens will serve no useful purpose because they will result in estimates of the damages due a plaintiff no fairer or more accurate than other, simpler mtehods would permit.

I do recognize that the courts must somehow deal with inflation in setting damage awards. I advocate adopting an approach that, as a matter of law, treats the inflation rate as totally offsetting the rate at which an award is discounted and that therefore considers neither rate in computing an award. Such an approach, which the majority calls the "Alaska Rule," is simple to apply and in my judgment more accurate than the formulae the majority advances for dealing with inflation.

I.

The majority, although noting that other methods might be acceptable, presents and endorses two specific proposals for negating inflation's effect on damage awards. The approach that it deems most desirable, in a bare summary, would increase an award by the likely increase in a plaintiff's wages resulting from all causes, including inflation, and then would discount the award at a rate reflecting the return on a relatively safe investment. A second approach would follow what the majority conceives to be the rule announced in *Feldman* v. *Allegheny Airlines*, 524 F.2d 384 (2d Cir. 1975). The majority's treatment of the *Feldman* Rule is inconsistent and may betray a misunderstanding of the Second Circuit approach. Essentially, however, the majority would compute the difference between inflation and the discount rates. After consideration of any possibility that the rate of yearly increase in the plaintiff's wages would differ from the rate of inflation, the award for each future year of plaintiff's expected life would then be discounted by that difference. These proposals, the majority asserts, best ensure that a plaintiff receives no more nor less than is his due in a damage award.

I agree that the paramount concern of a court should be ensuring that a damage award is as accurate and fair as is practically possible. I disagree, however, however, with the majority's notion that its proposals will ensure that a plaintiff will receive no more nor less than is his due. The majority's analysis is curiously limited: it involves only computational precision, the determination of which formulae most accurately eliminate the effect of future inflation on a damage award *once the rate of inflation is known*. I note that even considered on such limited terms the majority's preferred approach is not beyond objection: simplifications that the majority introduces into its calculations will overstate an award to a plaintiff. I also think it unfortunate that the majority was unable to decide on one specific proposal to mandate. Since the two formulae that the majority endorses will produce different results even if using the same data, the amount of an award will depend

arbitrarily on the method of computation chosen. Such concerns, however, are not critical to my dissent. The fundamental weakness of the majority's willingness to consider at all the sheer speculation involved in any prediction of future inflation rates. The majority's willingness to consider only computational precision in gauging the effects of inflation creates a mere illusion of accuracy because the underlying data that the formulae would use are themselves unreliable.

I do firmly maintain that it is quite evident that economic theory cannot predict future inflation rates with any degree of certainty. A survey of the general literature for the past several years illustrates the sorry tale of the repeated confusion, contradictions, and uncertainties of economic forecasts. *See, e.g.*, "Where the Big Economic Models Go Wrong," *Bus. Week* 70 (March 30, 1981); "An Amazing Contradiction in Economic Prophecies," *Bus. Week* 39 (May 28, 1979); "Inflation Defies the Guidelines," *Bus. Week* 32 (February 12, 1979); "Mixed Grades for the Economists," *Bus. Week* 30 (December 25, 1978); "Theory Deserts the Forecasters," *Bus. Week* 50 (June 29, 1974); Forbes, "Economics Shouldn't Be a Branch of Mathematics," *Forbes* 21 (January 18, 1982); "If We Don't Know Where We Are, How Can We Tell Where We Are Going," *Forbes* 119 (April 2, 1979); "Stockman's Ladder," *Newsweek* 66 (February 9, 1981); "Black-Box Forecasting," *Time* 92 (Feburary 23, 1981), Even the Council of Economic Advisors has conceded that "its ability to forecast inflation is at best imperfect." *The Economic Report of the President 1982* 215 (admitting federal government cannot fully anticipate the course of the economy); Solow, "The Intelligent Citizen's Guide to Inflation," *Public Interest* 49 (Winter 1975) (suggesting we may be less able to predict price levels 5-10 years into the future than in the past when stable prices were the norm). Moreover, these complaints about economic forecasting generally concern short term forecasts. Over a longer term, events as diverse—and unpredictable—as spending to finance a southeast Asian ware, an oil embargo, or world agricultural shortfalls could have a profound impact on future inflation. *See*

W. Branson & J. Litvack, *Macroeconomics* 408-14 (1976); Council of Economic Advisors, *Economic Report of the President 1978* 139-42. *Cf. Economic Report of the President 1974*, supra ("increasingly complex and interdependent world" increases difficulties in forecasting inflation); "Inflation Defies the Guidelines," *supra* (discussing variety of factors affecting inflation). To attempt to predict the course of inflation for decades into the future is to attempt the impossible, given our present economic knowledge. Finally, common experience supports the conclusion that predictions of inflation simply are beyond our capabilities. Older generations can still recall the Great Depression and can remember how unexpected that event was.

I realize that any estimate of the appropriate damages to award a plaintiff involves substantial speculation. I believe, however, that the degree of speculation involved in prediction of future inflation is far greater than that which we usually require of a jury and that it is not essential to computing an award. Requiring a jury to resolve the amount of future inflation is not a duty similar to that traditionally performed, and usually performed well, by a jury; the finding of facts regarding a particular incident or individuals. Rather, we are demanding that the jury become a seer for the future course of national, or even world, events. Nor is the universe of relevant factors so limited as it is in the usual findings required of a jury. As noted earlier, the factors that may affect inflation are extremely broad in scope and hardly within the practical limits for a jury's consideration. Finally, most predictions that a jury must make involve findings that can at least be actuarially or statistically estimated. That simply is not the case with estimates of future inflation. Admittedly, of course, a court or jury must at times make some finding concerning a fact not limited to the particular circumstances of a case, as when it determines the effect of future income taxes. Even those findings, however, I belive involve less speculation than occurs in predictions of future inflation. We at least can be relatively certain that income taxes will be a fixture of our future. That is not

necessarily the case with inflation; the volatility of changes in inflation rates over time alone renders them unique. More important, there is not the necessity to speculate on future inflation that exists for findings on, for example, income taxes. No adequate method exists for considering the effect of income taxes on an award without speculating on future taxes. That is not so with inflation. As I note later in this opinion, a related variable, the discount rate, can be used to offset inflation and eliminate the need for its consideration.3

The inability of the majority's proposals adequately to deal with inflation in computing damage awards is not the only sin of those proposals. The majority's holdings, both in the proposals adopted and in the procedures used for carrying out those proposals, are complex and extremely time consuming. Elaborate expert testimony will be necessary. And this testimony will not be limited to future inflation and future returns on investments. A court must also allow evidence of whether a plaintiff's wages would keep up with or would increase at a rate faster than the inflation rate. By extension it appears that a court must allow separate expert testimony on whether any other compensation of an award that might be affected by inflation, such as an award for future medical expenses, would increase at a rate greater or less than the inflation rate. *See* note 3, *supra*. Moreover, the majority's ambiguous suggestion regarding special verdicts, *see* majority opinion at note 41, appears to disregard Fed. Re. Civ. P. 49(a) in removing use of special verdicts from the discretion of the trial court, thereby vastly complicating the task of the jury and of the trial judge.

I conclude that the majority has erected an elaborate superstructure on a foundation of sand. If it were possible to predit the course of inflation over the decades ahead, the majority's formulae wouuld do so with some precision. Without accurate predictions, however, working through the formulae will be an exercise in futility that will impose serious new burdens on the district courts.

II.

Having taken the position that there is no way to predict future inflation without undue speculation, there remains for me the task of establishing some fair and practicable approach for estimating damage awards. I do not believe that this Circuit should continue to follow *Johnson* v. *Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.) (en banc), *cert. denied*, 423 U.S. 839, 96 S.Ct. 69, 46 L.Ed.2d 58 (1975). As the majority notes, *Penrod* permits an award to be discounted at a rate that includes some prediction of future inflation. Not also allowing some increase in the award to account for inflation unfairly penalizes the plaintiff. Faced with the need to find some alternative method for dealing with the pernicious effects of inflation, I believe that the most desirable approach would be to offset, as a matter of law, the inflation rate with the discount rates.

The adoption of such a rule would have several advantages over the majority's plan. It would be simple to apply and would require no time consuming expert testimony. Speculation about future inflation would be unnecessary. Since the inflation rate and discount rate are covariant in opposite directions, the rule would be relatively accurate, certainly much more accurate in my opinion than the majority's proposals. Finally, the effects of inflation would be considered uniformly and consistently for all damage awards. Since the inflation affecting awards will not vary in cases decided at similar times and compenssating injuries over similar time periods, such uniform treatment is fairer than an approach in which estimates of inflation vary with each case.

Having espoused the adoption of an approach that would deal with inflation as a matter of law, I must resolve one further issue, which of two variants of such an approach is preferable. One variant would establish a positive real rate of return on capital, that is, the rate of return that would exist on a relatively safe investment if there were no inflation. Such an approach would mirror that of *Feldman* v. *Allegheny Airlines*, 524 F.2d 384 (2d Cir. 1975) (1.5% real return); *see also Doca* v. *Marina Mercante Nicaraguense*, 634 F.2d 30 (2d Cir. 1979)

(suggesting using 2% real rate of return), *cert. denied*, 451 U.S. 971, 101 S.Ct. 2049, 68 L.Ed.2d 351 (1981). A second variant, the Alaska Rule disparaged by the majority, would treat the inflation and discount rates as offsetting each other totally and therefore cancelling each other out. Such an approach has been advocated or adopted by several courts. *E.g.*, *Freeport Sulphur Co.* v. *S/S HERMOSA*, 526 F.2d 300, 308 13 (5th Cir. 1976) (Wisdom, J., specially concurring); *Pfeiffer* v. *Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982); *Beaulieu* v. *Elliott*, 434 P.2d 665 (Alaska 1967); *Resner* v. *N. Pac. Ry.*, 161 Mont. 177, 505 P.2d 86 (1973); *Kaczkowski* v. *Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980).

I find a *Feldman*-type approach tempting since theoretically it may be preferable to the Alaska Rule. Ultimately, however, I, like Judge Wisdom in his specially concurring opinion in *Freeport Sulphur, supra*, would adopt the Alaska Rule. A rule establishing a positive real rate of return in practice involves as much guesswork as ruling that the inflation and discount rates offset each other completely—as an examination of the data that the district court in *Feldman* used in setting a 1.5% real rate will establish. *See Feldman* v. *Allegheny Airlines*, 382 F.Supp. 1271 (D.Conn. 1974), *aff'd in relevant part*, 524 F.2d 384 (2d Cir. 1975). Moreover, according to some economists, at least in an inflationary period the inflation component in the discount rate will fail fully to take into account the actual rate of inflation because the future depreciation in the value of money is not entirely foreseen. *E.g.*, I. Fisher, *The Theory of Interest* 43 (1930); *see also Freeport Sulphur Co.*, *supra*, 526 F.2d at 310 & n.7 (Wisdom, J., specially concurring). Such an effect would offset at least partially any positive real rate of return on capital. Even the assumption that there is some constant real rate of return is open to question; some economists have suggested that the real rate of return will vary with the inflation rate. J. Keynes, *The General Theory of Employment, Interest, and Money* 142-43 (1936); Carlson, "Short-Term Interest Rates as Predictors of Inflation: A Comment," 67 *Am. Econ. Rev.* 469 (1977); Steindl, "Price Expectations and Interest Rates," 5 *J. Money, Credit & Banking*, 939, 948 (1973).

Given the uncertainty described above in setting any positive real rate of return, I firmly believe a court should err, if it errs at all, in favor of the plaintiff, the non-culpable party, by establishing a total offset of the inflation and discount rates.

III.

To summarize, I believe that the majority has sunk into its own Serbonian bog in adopting cumbersome, complicated, apparently illegal (in disregarding Fed.R.Civ.P. 49(a)), and time consuming procedures for the district courts to follow in incorporating the effects of inflation into damage awards. Those procedures cannot be justified by their precision in offsetting the effects of inflation because the data the proceedures would use would be the product of pure speculation. A better procedure than that proposed by the majority and far simpler to apply, would, as a matter of law, treat the discount and inflation rates as totally offsetting each other.

APPENDIX F

United States Court of Appeals
Fifth Circuit

Dec. 22, 1983

Nos. 78-3985, 78-3064

Ruth CULVER, *et al.*,
Plaintiffs-Appellants, Cross-Appellees,
v.

SLATER BOAT CO., *et al.*,
Defendants-Appellees, Cross Appellants.

EUROPIRATES INTERNATIONAL, INC., *et al.*,
Defendants-Appellees and Cross-Appellees-Appellants,

v.

ODECO DRILLING, *et al.*,
Defendants-Appellees Cross Appellants.

Willie Mae BYRD, As Administratrix
of the Estate of Lawrence Byrd, deceased,
Plaintiff-Appellant Cross-Appellee,
v.

Heinrich Schmidt REEDEREI,
Defendant-Appellee Cross-Appellant.

Wife and children of foreman of anchor-pulling crew brought maritime personal injury case arising out of death. The Court of Apeals affirmed a judgment of the United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., as modified, 644 F.2d 460, but, on rehearing en banc, the Court of Appeals reversed and remanded, 688 F.2d 280. Appeals from judgments of the United States District Court

for the Middle District of Florida, Wm. Terrell Hodges, Chief Judge, were consolidated. On petition for rehearing, the Court of Appeals, Alvin B. Rubin and Frank M. Johnson, Jr., Circuit Judges, held that: (1) the case-by-case method is no longer to be used to adjust damage awards for inflation, and (2) fact finders must adjust damage awards to account for inflation according to below-market discount rate method.

Judgments reversed and cases remanded.

Brown, Circuit Judge, dissented and filed opinion in which Fay, Politz, R. Lanier Anderson, III, Randall, Tate, Sam D. Johnson and Jerre S. Williams, Circuit Judges, joined.

R. Lanier Anderson, III, Circuit Judge, dissented and filed opinion.

Tjoflat, Circuit Judge, dissented and filed opinion.

W. James Kronzer, W. W. Watkins, Houston, Tex., Frederick J. Gisevius, Jr., New Orleans, La., for Ruth Culver et al.

Leonard Fuhrer, Alexandria, La., for amicus curiae Louis Ober.

Richmond M. Eustis, New Orleans, La., for Slater Enterprises, Europirates, etc.

Drury, Lozes & Curry, Felicien P. Lozes, New Orleans, La., for Gulf Overseas Ser. Corp.

J. Walter Ward, New Orleans, La., for Ocean Drilling.

Mat M. Gray, III, New Orleans, La., for St. Paul Fire.

Joel D. Eaton, Walter H. Beckham, Jr., Miami, Fla., Roger Vaughan, Wagner Cunning, Vaughan & Genders, Tampa, Fla., for Willie Mae Byrd.

Fowler, White, Gillen, Boggs, Villareal & Banker, Nathaniel G.W. Pieper, Dewey R. Villareal, Jr., Tampa, Fla., for Heinrich Schmidt Reederei.

Appeals from the United States District Court for the Eastern District of Louisiana.

Appeals from the United States District Court for the Middle District of Florida.

ON PETITIONS FOR REHEARING

Before GODBOLD, Chief Judge, BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK and WILLIAMS, Circuit Judges.

ALBIN B. RUBIN and FRANK M. JOHNSON, JR., Circuit Judges:

In *Johnson* v. *Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.) (en Banc), *cert. denied*, 423 U.S. 839, 96 S.Ct. 68-69, 46 L.Ed.2d 58 (1975), this court held that juries "should not be instructed to take into account future inflationary or deflationary trends in computing lost earnings . . ." *Id.* at 241. Reviewing that decision in our first *en banc* consideration of these two cases, we overruled *Penrod* and held admissible evidence of inflation's probable effect on damage awards. *Culver* v. *Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982) (en banc) (Culver I). Concluding that the jury should resolve the issue on a case-by-case basis, we disclaimed any intention to establish a "single method" for considering future economic conditions. *Id.* at 299 n. 23. Instead, we discussed several permissible methods the district courts and parties could use. *Id.* at 305-06.

While we were considering an application for rehearing in *Culver I*, the Supreme Court decided *Jones & Laughlin Steel Corp.* v. *Pfeifer*, ___ U.S. ___, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). The Court's opinion in *Pfeiferm* cites *Culver I* and confirms our holding that the fact-finder should consider inflation in determining an appropriate damage awad. The Court's opinion also emphasizes, however, a fundamental point that we did not fully consider in *Culver I:* that courts must not allow the adjustment for inflation to convert " '[t]he average accident trial . . . into a graduate seminar on economic forecasting.' "

Reconsideration of *Culver I* in light of *Pfeifer* has convinced us that our failure to identify a single method as the one trial courts should use in adjusting damage awards for inflation, particularly in jury trials, would extend an invitation to litigants to engage in just such a seminar. We, therefore, widhdraw the opinion in *Culver I* insofar as it goes beyond overruling *Johnson*, and hold that, in the absence of a stipulation by the parties concerning the method to be used, fact-finders shall determine and apply an appropriate below-market discount rate as the sole method to adjust loss-of-future-earnings awards to present value to account for the effect of inflation. While expert testimony and jury instructions must be based on this method, juries may be instructed either to return a general verdict or to answer special interrogatories concerning the computation of damages.

I.

[1] The calculation of damages suffered either by a person whose personal injuries will result in extended future disability or by the representatives of a deceased person involves four steps: estimating the loss of work life resulting from the injury or death, calculating the lost income stream, computing the total damage, and discounting that amount to its present value.

In *Pfeifer* the Court recognized, as we did in *Culver I*, that calculation of the lost income stream begins with the gross earnings of the injured party at the time of injury. to this aount other income incidental to work, such as fringe benefits, should be added. From it, the fact-finder should subtract amounts the wage earner would have been required to pay, such as income tax and work expenses.

Even in a non-inflationary economy, earnings of a worker "tend to inflate" from the operation of a number of factors, "some linked to the specific individual and some linked to broader societal forces." The operation of both kinds of influences should be considered to reach the first stage in calculating an appropriate award, an estimate of what the lost

stream of income would have been "as a series of after-tax payments, *one in each year of the worker's expected remaining career.*"

A lump-sum award may be invested in a wide variety of securities, yielding varying rates dependent in part on their relative safety. Both *Pfeifer* and *Culver I* require that rate to be based on the return available from "the best and safest investments," and to be computed after considering the effect of income tax on the interest received.

The rate of interest available even on the safest investments varies depending on the time at which the investment matures. Therefore, in computing the rate to be used, it is essential to determine how the award will be invested. In *Pfeifer*, the Court recognized that the plaintiff might invest the award "exclusively in safe short-term notes, reinvesting them at the new market rate whenever they mature," or in "a mixture of safe short-term medium-term, and long-term bonds, with one scheduled to mature each year of his expected worklife." It then stated, "We perceive no intrinsic reason to prefer one assumption over the other."

[2] Inflation, which has been a permanent fixture in our economy for many decades, affects both the income stream and the market interest rate. In this opinion, we consider only the method of taking general economic inflation into account. In accomplishing this, as we said in *Culver I*, "[t]he goal is not . . . to *protect* the lump-sum award from the effect of inflation." It is, instead, "to assure the plaintiff the equivalent of the total of all of his future wages," including those earnings likely to be affected by inflation.

As the Court noted in *Pfeifer*, three methods are available for adjusting damage awards to account for the effect of inflation. In the case-by-case method, the fact-finder is asked to predict all of the wage increases a plaintiff would have received during each year that he could have been expected to work, but for his injury, including those attributable to price inflation. This prediction allows the fact-finder to compute the income

stream the plaintiff has lost because of his disability. The fact-finder then discounts that income stream to present value, using the estimated after-tax market interest rate, and the resulting figure is awarded to the plaintiff.

In the below-market-discount method, the fact-finder does not attempt to predict the wage increases the particular plaintiff would have received as a result of price inflation. Instead, the trier of fact estimates the wage increases the plaintiff would have received each year as a result of all factors other than inflation. The resulting income stream is discounted by a below-market discount rate. This discount rate represents the estimated market interest rate, adjusted for the effect of any income tax, and then offset by the estimated rate of general future price inflation.

The third method is the "total-offset" method. In this calculation, future wage increases, including the effects of future price inflation, are legally presumed to offset exactly the interest a plaintiff would earn by investing the lump-sum damage award. Therefore, the fact-finder using this method awards the plaintiff the amount it estimates he would have earned, and neither discounts the award nor adjusts it for inflation.

II.

The *Culver I* opinion would have permitted the parties to pursue any of these methods in order to demonstrate to the fact-finder what adjustment, if any, should be made to compensate for increases in the plaintiff's future wages due to the economic factors summed up by the term inflation. Indeed, we endorsed the first method, involving specific forecasts of inflation's effect on a particular plaintiff's wages, as "simpler and more accurate" than the below-market discount approaches.

The procedures necessary to determine the impact of future price inflation on a particular plaintiff on a year-by-year basis are complex and time consuming. Elaborate expert testimony is required. The battle of economic expert is apt to shift the

trial's emphasis from the determination of liability and the estimation of basic damages into the formulation of predictions concerning the national, indeed, global, economic future, including the likelihood of future increases or decreases in oil prices and the stability of foreign governments. Under *Culver I*, defendants were free not only to controvert the plaintiffs' damage calculations; they could also dispute the validity of the method by which the plaintiffs' experts calculated damages. If such a dispute evolved, the fact-finder would be required to decide which of at least two competing methods, each avouched by an expert, it would use to determine discount before applying the method it chose to determine the rate of discount, yet another determination to be based on contradictory expert testimony.

Different formulae, each thought to be theoretically accurate, might be applied in literally hundreds of individual cases because of the conclusions reached by different fact-finders. The result in otherwise similar cases would vary widely depending on the particular expert witnesses called, on the fact-finders' agreement or disagreement with the methods they advocated, and on the different fact-finders' evaluations of their testimony. The voyage in search of mathematical certainty would discover instead a continent of conflict and conjecture.

[3] Anticipating these problems to some degree in *Culver I*, we expressed hope that the parties would, by agreement, eliminate the need to litigate many of these confusing issues:

> In the great majority of cases, we believe, the parties can and will be able to stipulate to the methodology, discount rate, the admissibility of economic data, tables, etc. and other technical aspects, as well as to any particular issues of fact underlying the calculations.

Culver I, 688 F.2d at 311. We continue to express that hope. Nothing in this opinion prevents the parties from stipulating to any of these matters or to anything else that may affect the determination of damages. We cannot ignore the possibility, however, that in many, perhaps most, cases such stipulations

will not be possible. This opinion determines only the method to be followed when the parties cannot agree.

In such cases, litigating in every instance the amount and the effect of future price inflation is not likely to produce the result that would have been obtained had the plaintiff not been injured. No one can accurately predict the course of future inflation. A survey of the general literature for the past several years illustrates a sorry tale of repeated confusion, contradiction and uncertainty in economic forecasts. Current complaints about economic forecasting generally concern relatively short-term forecasts. Over a longer term, events as diverse—and unpredictable—as spending to finance a Southeast Asian war, an oil embargo, disagreement between members of the oil cartel, or a drought causing widespread agricultural failures could profoundly increase inflation. A major depression or the discovery of significant and inexpensive fuel resources might reduce its present impact.

Whether or not the science of economics continues to be dismal, it is assuredly in this regard conjectural. The case-by-case method sacrifices efficiency and simplicity for pursuit of a "delusive exactness." As the Court noted in *Pfeifer:* "It is perfectly obvious that the most detailed inquiry can at best produce an approximate result."

[4] The inherent inaccuracy of specific forecasts of future inflation, coupled with the length and complexity of the proceedings necessary to engage in such forecasts, convinced the Supreme Court that the case-by-case method of adjusting damage awards for inflation "should be discouraged." "[S]ince specific forecasts of future price inflation remain too unreliable to be useful in many cases, it will normally be a costly and ultimately unproductive waste of [plaintiffs'] resources to make such forecasts the centerpiece" of accident litigation. Recognizing the Court's disapproval of the case-by-case method, we hold that it should not be used in this circuit to adjust damage awards for inflation.

III.

The paramount concern of a court-awarding damages for lost future earnings is to provide the victim with a sum of money that will, in fact, replace the money that he would have earned. Arriving at a reasonable estimate of anyone's financial future involves estimates of anyone's financial future involves estimates of a whole spectrum of factors. We commonly exclude many relevant factors from consideration on the basis that they are so speculative that they cannot accurately be determined. For example, we consider only work-life expectancy and do not take into account the possibility that a worker will change to work that is more pleasureable but pays less. When considering the loss suffered as a result of the death of a wage-earner, we do not consider the likelihood that a widowed spouse may remarry. Nor do we take into account the stability of an already accomplished remarriage, or the age, appearance or personality of the surviving spouse.

While factors such as these do in fact affect the loss of future income, we place a higher value on a reasonable and workable system for establishing damages than we do on detailed precision in arriving at an award. "[W]e must remember that the ultimate total damage figure awarded is the sum of a series of predictions, none of which involves mathematical certainty, and that it is the reasonableness of the ultimate figure that is really in issue in such a case as this." *Barnes* v. *United States*, 685 F.2d 66, 70 (3d Cir. 1982) (quoting *United States* v. *Furumizo*, 381 F.2d 965, 970 (9th Cir. 1967)).

"[I]f forecasts of future price inflation fare not used, it is necessary [for the fact-finder] to choose an appropriate below-market discount rate." Adoption of this method guards against the wide disparity in results, the extended duration in trial time, and the increased cost to the parties that may be anticipated if a specific forecast of future price inflation is made anew in each case involving loss of future earnings. It achieves a no more uncertain approximation of inflation's effect on the damage award. Because it does not attempt a specific forecast of how inflation will affect the particular plaintiff before the court, however, it is less complex and time consuming.

Even establishing an approriate below-market discount rate, however, is difficult. Economists do not yet fully understand the relationship between inflation and interest. Recent studies discredit the received wisdom, voiced a decade ago, that there is a constant real rate of interest that can be determined merely by filtering inflationary expectations from nominal interest rates. However, while the studies find that the real rate varies, estimates uniformly fix its amount over any fairly lengthy period as falling into a range that runs from three percent to a negative rate of −1.5%.

[5, 6] We hold that fact-finders in this Circuit must adjust damage awards to account for inflation according to the below-market discount rate method. The parties may, if they wish, stipulate the below-market discount rate, as they may stipulate any other disputed issue. If they are unable to do so, they may introduce expert opinion concerning the appropriate rate. Other evidence about the effect of price inflation is inadmissible. Evidence about the likelihood that the earnings of an injured worker would increase due to personal merit, increased experience and other individual and societal factors continue, of course, to be admissible. We recognize that the Supreme Court declined in *Pfeifer* to select a single method of accounting for inflation. We are confronted, however, with the need to adapt that opinion to jury trials. We also think it desirable to afford litigants and the courts the opportunity to determine the actual operation of this less complex method in order that its efficacy for national use can be determined.

[7] As we have noted, the discount rate may be affected by the fact-finder's assumption about the type of investment the plaintiff will choose, for long-term investments usually yield higher nominal interest rate returns than short-term investments of the same quality. The Supreme Court having said in *Pfeifer* that it perceives "no intrinsic reason to prefer one assumption over the other," we mandate neither. However, the fact-finder should not consider the plaintiff's possible need for emergency funds as a factor in favor of short-term investments; the injured wage-earner should have no greater

right to a resource against future emergencies than he would have had if he had continued to work.

[8, 9] In judge-tried cases, a trial court adopting a pre-tax discount rate between one and three percent will not be reversed if it explains the reasons for its choice. This guideline, however, goes only to the reasonableness of the correlation between the pre-tax market rate of interest and the inflation rate. As discussed above, this pre-tax discount rate must then be adjusted for tax effects. If supported by appropriate expert opinion, the trial judge might make no discount or even adopt a negative rate not to exceed −1.5% before adjusting for tax effects. In jury trials, the jury should be instructed in the usual fashion concerning the weight to be given expert opinion evidence. The jury may then be permitted to return a single-figure award for damages or it may be required to answer interrogatories stating, among other items, the amount of loss of future earnings for each year for which it makes an award, and the discount rate it chooses to apply. The court will then be able to compute the total award or to require the parties to complete the arithmetic.

IV.

[IV] Just as we cannot ignore the reality of inflation, we cannot ignore the reality of inflation, we cannot ignore the fact that long term economic conditions may change or that economic forecasting may become more certain. We recognize too that, although both the Fifth and Eleventh Circuits will be bound by this decision, Congress has declared that we are no longer a single court. It fulfills rather than ignores the will of Congress to acknowledge that, in the future, either circuit *en banc* will be free to reconsider this decision. Should counselk for any party in any future case think this decision no longer reflects long-term economic facts or contemporary economic theory, a proffer of evidence may be made in the trial court to preserve the issue for an appellate panel and, thereafter, for *en banc* consideration.

[11] Although we adopt a single method for adjusting future damage awards, our ruling, made on application for rehearing, shall not apply to any ase in which, before the date this opinion was published, either a jury returned a verdict after being instructed on the basis of the principles set forth in *Culver I*, or a judge made findings of fact fixing damages pursuant to those principles.

For these reasons, Parts I through VI of our prior *en banc* decision, 688 F.2d 280, 283-95, are reaffirmed. The rule announced in *Johnson* v. *Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.) (en banc), *cert. denied*, 423 U.S. 839, 96 S.Ct. 68-69, 46 L.Ed.2d 58 (1975), is overruled. We withdraw, however, Parts VII through XII of our decision in *Culver I*. 688 F.2d at 295-311. The views expressed in this opinion shall govern the adjustment of federal damage awards for future lost earnings in this circuit.

Courts ar not prophets and juries are not seers. In making awards to compensate injured plaintiffs or the dependents of deceased workers for loss of future earnings, however, these fact-finders must attempt, in some degree, to gauge future events. Absolute certainty is by the very nature of the effort impossible. It is also impossible to take into account every bit of potentially relevant evidence concerning the tomorrows of a lifetime. The approach we adopt attempts to assure plaintiffs a fair measure of damages, to give defendants a reasonable adjustment for reducing future losses to present value, and to avoid making trials even more complex and their results even more uncertain. It is the product of a balancing of competing values. Ultimately, however, that is the root of all justice.

The judgments in *Clver*, No. 79-3985, and *Byrd*, No. 78-3064, are REVERSED, and the cases are REMANDED to the district court for further proceedings on the issue of damages. The panel opinions are adopted in all other respects.

JOHN R. BROWN, Circuit Judge, with whom FAY, POLITZ, R. LANIER ANDERSON, III, RANDALL, TATE, SAM D. JOHNSON and JERRE S. WILLIAMS, Circuit Judges, join, dissenting:

With the ink scarely dry on *Pfeifer (Jones & Laughlin Steel Corp.* v. *Pfeifer*, ___ U.S. ___, ___, 103 S.Ct. 2541, 2554, 76 L.Ed.2d 768, 788 (1983)), in which, with remarkable unanimous clarity, the High Court chose *not* to pick one of the several methods in its collective economic hat it considered legally sound for calculating lost future wages in civil damage actions and instead chose to leave that crucial decision to the trial judge in that and future cases, a majority of this Court elevates one approach beyond any choice to be the only way, for mandatory application in eighteen federal judicial districts across a half-dozen Southern states, for a broad group of litigants to arive at fair sums of money to compensate injured parties. Guided by the decision of *Pfeifer*, its approval of *Culver I*, and the direction that the choice of methodology should be left to the district court, not this Court, I respectfully dissent.

I.

In overruling *Penrod (Johnson* v. *Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.), (en banc), *cert. denied* 423 U.S. 839, 96 S.Ct. 68-69, 46 L.Ed.2d 58 (1975)) which forbade proof, argument, or jury instruction concerning inflationary factors in damage awards in actions under maritime or federal law, "it [was] not our purpose to establish a single methodology" for all federal courts in the Old Fifth to thenceforth account for such factors in determining future lost earnings. *Culver* v. *Slater Boat Co.*, 688 F.2d 280, 305 (5th Cir. 1982) (en banc) (Culver I). Rather, we adopted a "flexible approach to the probvlem which [w]ould result in fairness regardless of the economic circumstances that exist at the time of trial" and left open the opportunity for each party to offer relevant evidence supporting or refuting any of the several discussed theories of calculating lost earnings. *Id.* at 286. "In the dynamic and ever-changing world of finance and economics," we felt that "any standard which is inflexible . . . will likely be unable to cope with the problem of preventing windfalls either to plaintiff or defendant." *Id.* at 300. Our goal was "to create standards that are fair to both

sides of the controversy, with the trier of fact being allowed to receive and act upon credible evidence of the economic facts bearing, pro and con, on the competing theories." *Id.*

Pfeifer, on the heels of *Culver I*, clearly follows this flexible approach. The Supreme Court unequivocally refused to establish anything but "the general boundaries within which a particular award will be considered legally acceptable," U.S. at ___, 103 S.Ct. at 2555, 76 L.Ed.2d at 789, simply because no one method of calculating lost earnings was above some legitimate criticism and thus appropriate for all cases.

The Court questioned certain aspects of each of the three principal proposed methods, making it clear that under some circumstances one or more of the three could be inappropriate. (i) It thought that methods employing specific forecasts of future inflation on a case-by-case basis "remain too unreliable to be useful in *many* cases," ___ U.S. at ___, 103 S.Ct. at 2556, 76 L.Ed.2d at 790 (emphasis added), and discouraged their general use. (ii) As to the real interest (or below-market) discount rate approaches, the Court found the "economic evidence distinctly inconclusive regarding an essential premise of those approaches," *Id.*—the "key premise . . . that the real interest rate remains stable over time." Such a rate is "obviously not perfectly stable," and, the Court observed, "whether it is even *relatively* stable is hotly disputed among economists." *Id.* at ___ n.30, 103 S.Ct. at 2556 n.30, 76 L.Ed.2d at 790 n.30; *accord Culver I*, 688 F.2d at 302 ("As evidence becomes available that the next 20 or 30 years will not be like the past 20 or 30 years, then the *Feldman* [real interest rate] approach is less helpful."). Even the majority recognizes this. (iii) Lastly, it "was not prepared to impose [the "total offset" approach] on unwilling litigants," as had the Third Circuit below, for such approaches rely on at least one assumption the Court could not unquestioningly accept—that "the national patterns of wage growth are likely to reflect the patterns within any given industry." ___ U.S. at ___, 103 S.Ct. at 2557, 76 L.Ed.2d at 791-92; *cf. Culver I*, 688 F.2d at 299 ("penalizes defendants because . . . interest rates on rela-

tively safe investments will typically ride several percentage points above the rate of inflation"). To the Court, "[t]he legislative branch of the federal government [was] far better equipped than [it] to perform a comprehensive economic analysis and to fashion the proper general rule." ___ U.S. at ___, 103 S.Ct. at 2557, 76 L.Ed.2d at 792. Importantly, though, the Court characterized each of the three methods as "legally acceptable."

Consequently, the Court chose to allow to the trial judge on remand discretion to apply in a deliberate choice any one or more of the "legally acceptable" methods the Court discussed—those involving specific forecasts of future inflation, those using a below-market or real interest discount rate, or those based on the notion of total offset. That is precisely what *Culver I* ordained: no one method was either prescribed or forbidden. And *Pfeifer* approved *Culver I.*

II.

Despite the clear holding in *Pfeifer* and its approval of *Culver I*'s approach, the majority today declares that, though "the Supreme Court declined in *Pfeifer* to select a single method of accounting for inflation," unless the parties can stipulate to the contrary, all "fact-finders in this Circuit must adjust damage awards to account for inflation according to the below-market discount rate method." *See supram* at 16123. The Court takes from the district court—and puts squarely in the hands of the Court of Appeals—the responsibility of choosing, from among competing economic theories, the methodoligy or methodologies which could be used to most equitably and adequately determine future lost earnings under the circumstances of that case. Apparently this is done to spare jurors from the rigore of listening to presentations on such competing methods (which the Court seems "convinced" will invariably turn into "graduate seminar[s] on economic forecasting," *see supra* at 117), and from the difficulty of making such reasoned choices. In doing so, the Court makes choices of economic fact "hotly disputed [even] among economists."

Pfeifer, like *Culver I*, however plaintly evidences a confidence that trial courts are fully capable and actually better able to make such difficult decisions on the facts of individual cases, at least until Congress declares otherwise.

I thus must dissent.

R. LANIER ANDERSON, III, Circuit Judge, dissenting:

Although I personally approve of the approach outlined by Judges Rubin and Frank M. Johnson, and would recommend it to district courts in this circuit, I agree with Judge Brown that the Supreme Court in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, ___ U.S. ___, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), has disapproved of that approach. Accordingly, I join Judge Brown's dissent.

TJOFLAT, Circuit Judge dissenting:

In *Culver*, No. 79-3985, I continue to adhere to my view that appellants are not entitled to a new trial. *Culver* v. *Slater Boat Co.*, 688 F.2d 280, 315 (5th Cir. 1982) (en banc) (CulverI) (Tjoflat, J., dissenting).

In *Byrd*, No. 78-3064, I join in Judge Brown's dissenting opinion.

Office - Supreme Court, U.S.
FILED
MAY 26 1984
ALEXANDER L. STEVAS,
CLERK

Case No. 83-1749

In the Supreme Court of the United States

October Term, 1983

HEINRICH SCHMIDT REEDEREI,
Petitioner,

vs.

WILLIE MAE BYRD, as Administratrix of the Estate of Lawrence Byrd, deceased,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case No. 83-1749

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Petitioner,

vs.

WILLIE MAE BYRD, as Administratrix of the Estate of Lawrence Byrd, deceased,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, WILLIE MAE BYRD, as Administratrix of the Estate of Lawrence Byrd, deceased, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 722 F.2d 114.

REASONS WHY THE WRIT SHOULD BE DENIED

The petitioner's argument is limited to a single paragraph. In that paragraph, the petitioner argues that this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, ... U.S. ...., 103 S. Ct. 2541, 76 L.Ed.2d 768 (1983), *mandates* that litigants be allowed to utilize any of the three currently recognized methods for calculating an award of

future pecuniary damages in an inflationary economy—and that the lower court "violated" that mandate by requiring litigants in the "Old Fifth" Circuit to utilize the "below market discount rate" method. We disagree.

In *Pfeifer*, although this Court eschewed the task of selecting one of the three methods as a mandatory rule, it did not mandate the availability of all three methods. Instead, it discussed the pros and cons of each; concluded that the evidence was inconclusive concerning the economic accuracy of each of the three methods; and decided that it would "do no more than necessary to resolve the case before [it]". It held thereafter only that use of the "total offset" method was not mandatory in federal courts. The lower court's decision in this case does not mandate use of the "total offset" method in federal courts in the "Old Fifth" Circuit, so it clearly does not "violate" this Court's holding in *Pfeifer*.

In our judgment, the question decided by the court below was left "open" in *Pfeifer* for further consideration by Congress and the lower courts. Deciding an "open" question simply does not create "conflict", and this Court therefore need not intervene in this case for the purpose of reaffirming *Pfeifer*. If it is to intervene at all, intervention can be justified only by a consensus that the lower court's decision is simply wrong. The lower court's decision is not clearly wrong, however. In fact, it is perfectly consistent with everything which this Court said in *Pfeifer*.

It is clear from *Pfeifer* that, of the three methods discussed, the "total offset" method was deemed to be the least desirable method to utilize in federal trials. This Court also implicitly disapproved the "specific forecast of future price inflation" method—noting that it would "normally be a costly and ultimately unproductive waste of . . .

resources to make such forecasts the centerpiece of litigation . . ."; voicing its concern that utilization of the method would tend to convert the average trial "into a graduate seminar on economic forecasting"; and stating that "trial courts should be discouraged from pursuing that approach". Finally, this Court held that a trial court utilizing the third method, the "below market discount rate" method, "should [not] be reversed if it adopts a rate between one and three percent and explains its choice". The obvious answer to the question left open in *Pfeifer* is therefore clearly suggested by *Pfeifer* itself— and all that the lower court did in this case was answer the open question exactly as *Pfeifer* suggests it should be answered.

And, as the lower court's decision makes clear, the question needed to be answered for practical reasons— efficiency and economy in the conduct of trials. The method selected by the lower court is clearly the most efficient and economical method of the three; and given this Court's recognition in *Pfeifer* that all three methods yield only rough approximations, mandating the use of one rough approximation over another appears to cause no real harm in the ultimate outcome of any given suit. Surely, if a trial court cannot be reversed for mandating use of the "below market discount rate" method in any given trial, as this Court squarely held in *Pfeifer*, the Court of Appeals cannot be reversed for mandating use of that method in the trial courts which it supervises. Put another way, this Court must reverse itself in order to reverse the lower court in this case. With the ink scarcely dry on *Pfeifer*, we do not believe this Court should revisit it at this time.

The question presented here might be appropriate for review at some future date, if it becomes necessary to

resolve conflicts among the circuits in post-*Pfeifer* decisions. No such conflicts have arisen, however, and for the time being, we think the implications of *Pfeifer* deserve to be thrashed out in the lower courts before this Court tackles the question left open in *Pfeifer*. Because the lower court's decision is perfectly consistent with *Pfeifer*, and because no conflicts have yet developed among the lower courts concerning the implications of *Pfeifer*, we respectfully submit that certiorari should be denied.

Respectfully submitted,

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